U.S. Department of Justice

March 04, 2016

The Honorable Marvin J. Garbis
Senior United States District Judge
United States District Court
District of Maryland
101 West Lombard Street
Baltimore, MD 21201

Re: United States v. Efploia, MJG-11-0652
United States v. Aquarosa, MJG-11-0671

Dear Judge Garbis,

The United States, by and through undersigned counsel, is responding to the Court's Order dated February 22, 2016. The Court's Order asks several questions and provided an opportunity to file additional materials.

1. Personal vs. Litigation Expenses

The Court's order suggests that there may be something conceptually different about personal expenses, as distinct from litigation expenses. The government agrees in principle, though the facts of this case are unique. Specifically, in order to obtain the return of the ship, the Coast Guard required the vessels owner (Aquarosa) and operator (Efploia) to post bonds and sign a security agreement guaranteeing the care and fair treatment of the crew during the pendency of the criminal investigation. Under the terms of the security agreement, the owner/operator was required to pay salaries, per diem, hotel expenses and provide medical care. Counsel's filings allege that the medical services provided to Mr. Lopez were inadequate and that counsel determined and assisted Mr. Lopez in seeking medical care at their own expense. Whether or not this was necessary, wise, or for purely altruistic purposes, it was an expense counsel incurred that was unrelated to any litigation and thus arguably falls outside of the contingency fee agreement. It was within the scope of the security agreement between the Coast Guard and the owners/operators. It is unknown whether defense counsel sought reimbursement from the owner/operator after-the-fact. However, the government does not recall any efforts by counsel to seek the Coast Guard's assistance in obtaining reimbursement prior to the return of the surety bond.

Having fined the defendant, and set aside a portion of that fine received as an award for Mr. Lopez, the Court has now inquired if there is any reason why the Court could not use a

portion of the award amount to pay personal expenses of Mr. Lopez's to a third party – his counsel. As with attorney expenses, we are unaware of any authority to provide fine monies received by the Court to a recipient other than the United States Treasury or another recipient authorized by statute (*i.e.,* the whistleblower as provided for under 33 U.S.C. § 1908). While there may be a conceptual difference between personal expenses and litigation expenses, we do not see any legal difference in terms of the Miscellaneous Receipts Act.

It is possible to imagine other third-parties wanting to assert claims on a whistleblower's award in future cases, including their employers. As a policy matter, the government questions whether it is desirable for the Court (and by extension, the government) to become embroiled in the relationship between a whistleblower and creditors. Such an approach could lead to creditors seeking to assert claims against funds held by the Court prior to the funds being dispersed to the whistleblower. As the present case has shown, this is not an efficient expenditure of judicial or prosecutorial resources.

Finally, the government observes that the Court's Order states that "[i]ncluded within the expenses for which counsel seeks reimbursement are some that may properly be considered as personal expenses of Mr. Lopez that he should pay from his own funds." (emphasis added) It is the government's understanding that defense counsel has not sought and is not now seeking any "expenses" from the Court or from their client. As observed in our prior filing, the counsel drafted contingency fee agreement absolutely prohibits counsel from seeking litigation expenses. Consequently, the government respectfully recommends that this Court abstain from addressing questions not requested by any party. That said, the Court does have a role in determining a reasonable attorney fee, if any, and can certainly consider out of pocket expenses in determining the amount of a reasonable fee, if any. In this regard, the government would have no objection were the Court to restrict counsel to accepting a *fee* that includes no further payment other than an amount that was the same as the purported personal expenses.[1]

2. Chart

The Court's Order requested assistance from the parties in making additions and corrections to a chart originally supplied by defendant Efploia. The government has provided the requested information in Attachment 1. At the hearings conducted by the Court, the government expressed objections and concerns to the chart supplied by Efploia and the arguments made by the defendant that bear repeating in this context.

The government finds that the chart is unhelpful to any issue pending before the Court. There is no dispute amongst any party or non-party that the Court has discretion to issue an award up to 50 percent of the criminal fine, that judges in past cases, including in this District, have so exercised their discretion to make awards, and that the majority of those awards have been 50 percent of the total amount of the fine imposed pursuant to APPS.

[1] The government prefers this formulation rather than an Order directing the Clerk to issue any further payment to a recipient other than the U.S. Treasury or the person who the Court has found provided information leading to conviction and thus qualifying for an award pursuant to 33 U.S.C. § 1908(a).

The government does have a particular concern with the defendant's proposed ranking of cases by the highest per capita award amount (the left hand column on the chart). This ranking fails to take into account a number of important factual differences between cases. The presentation of information is inherently misleading and likely to be misconstrued as presented. The amount of a possible whistleblower award is contingent upon the number of APPS counts, as well as other factors including the fine apportioned to the APPS counts and the defendant's ability to pay. In some cases, the available amount was limited because the defendant committed violations during only one port call in the United States. In other instances, the information provided by a whistleblower was of greater assistance because it disclosed multiple violations involving numerous visits to the United States with false records and/or dumping in U.S. waters. In some, the overall criminal fine was influenced by other factors such as ability to pay or the strength of the government's case.

In the Aquarosa/Efploia case, the information provided by Mr. Lopez was unique in two distinct ways. First, Mr. Lopez's information resulted in two corporate criminal convictions, not just one. Two different and unrelated corporate defendants were convicted in two separate cases – one against the owner (Aquarosa) and one against the operator (Efploia). This is something that has rarely occurred previously or since, except in relatively infrequent instances where the two entities were really closely related. Second, Mr. Lopez's information disclosed two different types of violations of APPS. Most cases have involved either the illegal discharge of oil or of garbage/plastic, but not both as occurred in this case. Thus, Mr. Lopez's information led to two different defendants being convicted with two different types of APPS violations. Like cases involving numerous port calls, Mr. Lopez's information was of substantial assistance to the government because it resulted in more counts of conviction against more defendants.[2] It would be incorrect to argue that Mr. Lopez should receive a lower percentage of the aggregate amount of both cases and both types of convictions, rather than viewing them for what they were – separate convictions of separate defendants for separate violations. The government also submits that it could serve to undermine the manifest intent of the statute to incentivize reporting of these inherently difficult to detect crimes by treating all cases in an identical manner without regard to their differences.

At the hearing, the ranking by total monetary amount of an award to an individual was used by Efploia to make the unfortunate argument that this whistleblower should not receive an award inconsistent with his minimal pay and the impoverished economy of the country he calls home. This argument also ignored the fact that most whistleblowers will never again be able to find employment in their chosen profession. In addition to being a discriminatory argument, this position also failed to recognize that there is a wide range of countries, including developed economies, that compose the maritime workforce. The defense bar in this and other cases have further intimated if not alleged that whistleblowers are incentivized to make up false allegations by Congress' decision to provide an award. And yet the Joint Factual Statement signed by Efploia and its counsel contains a robust admission that the Mr. Lopez's allegations were in fact true and correct. The fact is that the APPS whistleblower award provision has been remarkably successful in achieving convictions for serious crimes that would otherwise go undetected.

[2] It is worth noting in this context that Mr. Lopez's current counsel played no role whatsoever in counseling Mr. Lopez at the time he provided this information. Rather, present counsel entered after Mr. Lopez cooperation had taken place.

One of Efploia's main arguments was that the Court should exercise its discretion and not issue any APPS award to an otherwise qualifying whistleblower who did not report the criminal activity taking place at the behest of his commanding officers to authorities in any other foreign port where the ship stopped, or internally to the company that employed those officers (but which was not the employer of the crew member). This argument ignores the fact that very few other countries have any track record of prosecuting deliberate MARPOL violations, let alone a legal process that would protect witnesses from obstruction of justice such as occurred in the vast majority of vessel pollution prosecutions. The government's prior pleadings noted instances in which corporate representatives, including supervisory shore-based employees, discouraged internal reports and/or retaliated against crew members making such reports.

To conclude, while the information requested by the Court has been provided in Attachment 1, the government urges the Court not to adopt the oversimplified presentation of these cases proposed by the defendant and either not include this chart in the Court's decision, or at least not include the ranking of award amounts in the way proposed by defendant Efploia.

Respectfully submitted,

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By:

/s/

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GOVERNMENT'S ATTACHMENT 1

I. Corrections to Existing Chart

a. *U.S. v Nicanor Jumalon*: should be *United States v. Accord Ship Mgmt,* No. 3:07-CR-00390

b. *United States v. Odfjell,* Nos. 3:14-CR-00038-00039 (D. Conn.)

2014, one whistleblower awarded $500,000

c. *United States v. Polar Tankers:*

Case was 2007 not 1997

d. *United States v. Ionia Management,* No. 3:07-CR-00199, 134 (D. Conn.)

2011, prosecution of recidivist corporation. Chart states 8 whistleblowers, there were only 7. Only one was paid $550,000 not two as indicated, two awarded $350,000; one awarded $75,000; three awarded $25,000. Total award was $1.4 million.

e. *United States v. Crescent Ship Services, Inc.,* No. 2:94-CR-00383:

1995, one whistleblower awarded $128,000 not $125,000 as indicated. Increase due to portion awarded to whistleblower from fines paid by individual defendants.

f. *United States v. Regency Cruises, Inc.*: Case number should be: 8:94-CR-00245

1995, one whistleblower awarded $35,000, one whistleblower awarded $15,000, one whistleblower awarded $10,000, three whistleblowers awarded $5,000.

II. Additional Cases

United States v. Ciner Gemi Acente Isletni Sanayi Ve Ticaret S.A., No. 1:15-CR-00616 (D. Md.)

2016, two whistleblowers awarded $225,000 and $25,000 respectively.

United States v. Carbofin S.P.A. et al., Nos. 8:14-CR-00500, 00501 (M.D. Fla.)

2015, one whistleblower awarded $100,000

United States v. AML Ship Management GMBH, Nos. 15-CR-00007, 00018 (D. Alaska)

2015, one whistleblower awarded $150,000.

United States v. Norbulk Shipping UK, Ltd, No. 15-CR-00294 (D.N.J.)

2015, three whistleblowers each awarded $83,333

GOVERNMENT'S ATTACHMENT 1

United States v. Herm. Dauelsberg GMBH & Co. KG, No. 14-CR-00200 (C.D. Calif.)

2015, four whistleblowers each awarded $125,000.

United States v. Noble Drilling (U.S.) LLC, No. 3:14-CR-00114 (D. Ak.)

2015, one whistleblower awarded $512,500

United States v. Marine Managers et al., No. 2:14-CR-00128 (E.D. La.)

2015, two whistleblowers each awarded $100,000

United States v. Hachiuma Steamship Co., LTD et al., Nos. 1:14-CR-00505, 1:15-CR-00005 (D. Md.)

2015, one whistleblower awarded $250,000

United States v. Odfjell Asia II Pte Ltd. et al., Nos. 3:14-CR-00038-00039 (D. Conn.)

2014, two whistleblowers each awarded $250,000

United States v. Diana Shipping Services S.A., et al., No. 2:13-CR-00040 (E.D. Va.)

2014, two whistleblowers each awarded $75,000

United States v. Gulf Stolt Ship Management, Nos. 2:13-CR-00049 and 00073 (E.D. La.)

2013, one whistleblower awarded $187,500

United States v. Sanford Ltd. et al., No. 1:11-CR-00352 (D.D.C.)

2013, three whistleblowers each awarded $26,389

United States v. Cleopatra Shipping Agency, Ltd., No. 3:12-CR-00102 (M.D. La.)

2012, one whistleblower awarded $150,000

United States v. Stanships, Inc., No. 2:10-CR-00172 (E.D. La.)

2011, two whistleblowers each awarded $68,750

United States v. Styga Compania Naviera S.A, No. 4:09-CR-00572 (S.D. Tex.)

2010, five whistleblowers each awarded $62,500

United States v. Cooperative Success Marine, No. 4:10-CR-00032 (E.D.N.C.)

2010, four whistleblowers each awarded $50,000

United States v. Casilda Shipping, Ltd. et al., No. 4:08-CR-00448 (N.D. Calif.)

2009, four whistleblowers each awarded $62,500

GOVERNMENT'S ATTACHMENT 1

United States v. STX et al., Nos. 3:08-CR-05653 and 5686 (W.D. Wash.)

2008, two whistleblowers each awarded $87,500

United States v. Consultores De Navegacion et al., No. 1:08-CR-10274 (D. Mass.)

2008 and 2009 cases in D. NJ and D. Mass. consolidated in D. Mass, two crewmembers awarded $207,500 and $192,500 respectively

United States v. B. Navi Ship Management Services et al., Nos. 4:08-CR-00032 and 00033 (S.D. Tex.)

2008, one whistleblower awarded $85,000 and five others awarded $43,000

United States v. Clipper Marine Services et al., No. 2:07-CR-00264 (D.N.J.)

2008, three whistleblowers awarded $75,000, two others awarded $50,000, one awarded $25,000

United States v. Fairdeal Group Management, No. 1:05-CR-00750 (S.D.N.Y.)

2005, one whistleblower awarded $87,500

United States v. DST Shipping, No. 04-CR-01728 (C.D. Calif.)

2005, three whistleblowers each awarded $75,000, one awarded $25,000

United States v. Boyang (Busan) Ltd., No. 05-CR-00035 (D. Alaska)

2005, one whistleblower awarded $250,000

United States v. Fujitrans Corporation of Japan, Nos. 04-CR-00531, 00469 (D. Ore.)

2005, one whistleblower awarded $360,000

United States v. Fairmont Shipping (Canada) Ltd. et al., No. 3:03-CR-00506 (D. Ore.)

2003, one whistleblower awarded $225,000

United States v. Ulysses Cruises, Inc., et al., No. 97-CR-00694 (S.D. Fla.)

1998, two whistleblowers each awarded $12,500