

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA *

vs. * CRIMINAL NO. MJG-11-0652

EFPLOIA SHIPPING CO., S.A. *

Defendant *

* * * *

UNITED STATES OF AMERICA *

vs. * CRIMINAL NO. MJG-11-0671

AQUAROSA SHIPPING A/S *

Defendant *

* * * * *

BENCH DECISION RE: WHISTLEBLOWER AWARD

The Court has before it the Government's Motion for Whistleblower Award in United States v. Efploia Shipping Co., S.A. [ECF No. 5 in MJG-11-0652], and the materials submitted relating thereto. The Court has heard testimony, reviewed the exhibits, and had the benefit of the arguments of counsel. The Court has made its factual findings herein based upon its evaluation of the evidence and the reasonable inferences drawn therefrom.

In these consolidated cases,¹ the Government charged the defendants with violations of the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901 et seq. ("APPS") pertaining to the M/V Aquarosa ("the Ship"). The cases were resolved with guilty pleas by Defendant Aquarosa Shipping, A/S ("Aquarosa") (owner of the Ship) and Defendant Efploia Shipping Co. S.A. ("Efploia") (technical manager and operator of the Ship) to:

Count 1: Obstruction of justice in violation of 18 U.S.C. § 1505;

Count 2: Knowingly failing to maintain an accurate Oil Record Book in which all disposals of oil residue and discharges overboard of oily mixtures, slops from bilges and bilge water that accumulated in machinery spaces were fully recorded in violation of 33 U.S.C. § 1908(a) and 33 C.F.R. § 151.25;

Count 3: Knowingly failing to maintain a Garbage Record Book in which all discharges of garbage, as defined in Annex V of MARPOL 73/78, were accurately recorded, in violation of 33 U.S.C. §§ 1907(d) and 1908(a) and 33 C.F.R. § 151.55; and

Count 4: Making false statements in violation of 18 U.S.C. § 1001.

ECF No. 15 (in MJG-11-0652) at 2, No. 10 (in MJG-11-0671) at 2.

The Court imposed the same sentence in each case: on each of Counts, 1, 2, 3, and 4, a three-year term of organizational

¹ In a separate case, the Chief Engineer of the Ship pleaded guilty to obstruction of justice and was sentenced to 3 months imprisonment. United States v. Konstantinidis, MJG-11-0651.

probation requiring a payment of \$275,000 as organizational community service to the National Fish and Wildlife Foundation; on each of Counts 2 and 3, a fine of \$462,500 (a total fine of \$925,000). Accordingly, Aquarosa and Efploia were sentenced to pay fines totaling \$1,850,000. These fines have been paid in full.

By the instant motion, the Government seeks to have the Court exercise its discretion to make a "whistleblower award" pursuant to 33 U.S.C. § 1908(a) to an informant, Salvador Lopez ("Lopez"), in the maximum permitted amount of 50% of the fines imposed on Aquarosa and Efploia, that is, \$925,000. However, the Government objects to the fee agreement between Lopez and his current counsel² that provides for a 20% contingent fee and seeks to have the Court issue an order limiting the attorney's fees to not more than \$10,000. Efploia takes no position regarding the legal fee issue but objects to any total whistleblower award in excess of \$462,500.

² As discussed herein, Lopez, immediately upon entering the United States, provided the information upon which the prosecution was based to Coast Guard inspectors and investigators. Thereafter, he was provided court-appointed counsel and again met with prosecutors who advised him and his court-appointed attorney that he may obtain a whistleblower award. Thereafter, his current counsel replaced his court-appointed counsel and obtained Lopez' signature on the contingent fee contract at issue.

I. BACKGROUND

A. The Illegal Dumping

The Ship was constructed in Yangzhou Guoyu, China and launched in or about June 2010. At times relevant hereto, Efploia was the technical manager and operator of the Ship.

On or about June 15, 2010, Lopez, a Philippine national,³ joined the Ship's crew at the shipyard. The Ship began commercial operations on June 21, 2010, sailing from China with stops in various countries, including Singapore, Brazil, and the Netherlands, before arriving in the United States at Baltimore harbor on February 19, 2011.

During the course of the Ship's travel, Lopez observed the chief engineer dumping waste into the ocean using what is referred to as a "magic pipe" arrangement. Lopez took photographs evidencing the dumping to disclose to the United States government when he arrived at an American harbor.

B. Lopez' Prompt Report to U.S. Coast Guard

On February 19, 2011, the Ship arrived in the United States at Baltimore, Maryland. The next day, U.S. Coast Guard inspectors boarded the Ship to conduct an inspection. During

³ Seafarer jobs are highly desired by Philippine nationals as they are well paid compared to other employment available.

the inspection, Lopez handed a note to the inspectors that stated, "I HAVE SOMETHENG [sic] TO TILL [sic] YOU BUT SECRET." He told the inspectors that the Ship had made improper discharges into the ocean and showed them photographs on his cell phone supporting the statement. He showed the inspectors locations and tools and equipment used in the discharges, drew diagrams, and told them how the discharges were done.

Lopez was also, that day, interviewed by Coast Guard Investigative Service investigators and provided them with information regarding the improper discharges. In addition, he provided a notebook and documents of evidentiary value. Thereafter, he was again interviewed by the investigators and provided some 300 photographs depicting the discharge process through use of a "magic pipe."

In sum, promptly upon his entry into the United States, Lopez - before being represented by any attorney - gave the Coast Guard information and evidence that led to the prosecution and convictions in the instant cases.

Shortly after February 19, 2011, a union representative for the International Transport Workers' Federation ("ITF"), Arthur Petitpas ("Petitpas"), met with Lopez.⁴ Lopez told Petitpas about his having provided information and evidence regarding illegal dumping to the Coast Guard. Petitpas recommended that

⁴ On February 20, 21, or 22.

Lopez obtain legal representation and recommended J. Stephen Simms, Esquire ("Mr. Simms") to represent him. Lopez, however, obtained court-appointed counsel.

On or about March 8, 2011, the United States District Court for the District of Maryland appointed Nicholas J. Vitek, Esquire ("Mr. Vitek"), pursuant to the Criminal Justice Act, to represent Lopez in the Aquarosa matter. Mr. Vitek arranged for Lopez to receive limited immunity so that he could proceed to cooperate with Government counsel and investigators by continuing to provide information.

On March 21, 2011, Lopez and Mr. Vitek, as his attorney, met with Government counsel and investigators for a "proffer session." At this meeting, Lopez again provided information regarding the pertinent offense as well as his personal notebook, in which he had documented the illegal activities. At this meeting, Government counsel communicated to Mr. Vitek and his client, Lopez, that they were considering Lopez for a whistleblower award.

C. Mr. Simms Replaces Mr. Vitek as Counsel for Lopez⁵

On or before March 29, 2011, Petitpas learned that Lopez was being represented in the Aquarosa matter by Mr. Vitek. Petitpas contacted Mr. Simms and informed him of this, and Mr. Simms told Petitpas that Mr. Vitek did not appear to have experience in whistleblower matters. On March 29, 2011, Mr. Simms had a conversation with Lopez regarding Mr. Simms' becoming counsel for Lopez.⁶

Mr. Vitek testified in the instant proceeding that he did not consent to Mr. Simms' speaking with his client, Lopez. Mr. Vitek testified that he was only informed of Mr. Simms' meeting with his client in a voicemail from Mr. Simms after the meeting had taken place, with Mr. Simms saying that he had just had a conversation Mr. Vitek's client. Mr. Simms testified at the evidentiary hearing and did not contradict Mr. Vitek's testimony regarding the absence of advance notice of his discussion with Lopez. Mr. Simms did not repeat, in his testimony at the

⁵ Issues regarding the propriety of Mr. Simms' obtaining Lopez as a client are not relevant to the determination of the amount of the whistleblower award granted Lopez. However, to the extent - if at all - pertinent in regard to counsel's claim for payment of fees, they may be considered.

⁶ Mr. Simms testified that he did not understand that Lopez was represented by counsel of his choosing regarding an APPS award - presumably justifying his contacting Lopez directly. However, Mr. Simms did not deny that he knew that Lopez was represented by Mr. Vitek in regard to the Aquarosa matter in which the whistleblower award would be made.

evidentiary hearing, his statement to the Court in an earlier proceeding that Mr. Vitek knew of, and had consented to, Simms' contacting and meeting with Lopez.⁷ The Court finds Mr. Vitek's testimony truthful and reliable and finds that Mr. Simms did not inform him before speaking with his client, Lopez.

After Mr. Simms spoke with Lopez on March 29, 2011, he sent an email to Mr. Vitek informing him that Lopez wished to engage Mr. Simms to assist with his potential whistleblower recovery.

The next day, March 30, 2011, Lopez - with Mr. Vitek, but not Mr. Simms, as his attorney - met with Government counsel for a continued proffer session. Mr. Vitek informed Government counsel that he was not sure if the proffer session could go forward because of Mr. Simms' involvement. Mr. Vitek then spoke with Lopez who indicated his desire to move forward with the proffer session with Mr. Vitek as his attorney and Mr. Simms absent. The session proceeded. Mr. Vitek informed Lopez that the Government considered him to be a whistleblower who may be

⁷ On May 11, 2011, in an ex parte proceeding relating to Mr. Simms' representation of Lopez, Mr. Simms stated to the Court that, prior to his meeting with Lopez, he had sent Mr. Vitek an e-mail. He further said, "he calls me back and I said, look, I am going to meet with Mr. Lopez. And he says, okay, well, I don't know what I think about that, but fine." Tr. May 11, 2011 at 21. In reliance upon Mr. Simms' uncontradicted ex parte statement, the Court, stated: "I haven't spoken to Mr. Vitek but I have no reason to doubt that he at least acquiesced in the contact [with Lopez]. . . ." Id. at 49. The Court, having now heard Mr. Vitek's testimony, finds Mr. Simms' statement to the Court to have been inaccurate.

able to recover a monetary award under APPS and that he - Mr. Vitek - was willing to assist Lopez in getting the award.

Two days later, on April 1, 2011, Mr. Simms, another member of his firm, and Petitpas met with Lopez and five other seamen from the Ship regarding their involvement in the Aquarosa matter. Mr. Simms knew, prior to this meeting, that these five seamen were represented by Paul Hazelhurst, Esquire ("Mr. Hazelhurst") in regard to the Aquarosa matter. Mr. Hazelhurst testified that Mr. Simms had contacted his clients without his knowledge or consent and that he was upset that Mr. Simms had met them without his permission. Mr. Simms did not contradict this testimony. The Court finds Hazelhurst's testimony truthful and reliable. Ultimately, none of these seamen was considered for a whistleblower award, and none became a client of Mr. Simms.

On April 8, 2011,⁸ Simms informed Government counsel that he and his firm were replacing Mr. Vitek as counsel for Lopez in the criminal case.

D. The Contingent Fee Agreement

On April 12, 2011, four days after Mr. Simms replaced Mr. Vitek as counsel for Lopez, Mr. Simms met with Lopez and an

⁸ Following some communication about the possibility of Mr. Vitek's continuing to represent Lopez working with Mr. Simms.

interpreter regarding the contingent fee agreement. At that meeting, Lopez signed the contingent fee agreement at issue herein that, among other things, referred to the filing of a qui tam False Claims Act case by Lopez as relator.

On April 22, 2011, Mr. Simms filed, on behalf of Lopez, a qui tam action against, inter alios, Aquarosa and Efploia under the False Claims Act. United States of America ex rel. Salvador Lopez v. M/V Aquarosa et al., MJG-11-1059 (D. Md.). The suit did not proceed to the point at which the potential merits of the claim was addressed by the Court. Rather, after the Government declined to intervene, Mr. Simms - on behalf of Lopez - dismissed the case voluntarily. Id.

II. THE WHISTLEBLOWER AWARD

The Act to Prevent Pollution from Ships is the domestic legislation implementing the International Convention for the Prevention of Pollution from Ships (1973) as modified by the Protocol of 1978 ("MARPOL Protocol"). The criminal penalties provision of APPS states:

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 1/2 of such fine may be paid to the person giving information leading to conviction.

33 U.S.C. § 1908(a) (emphasis added).

The Court recognizes that the APPS whistleblower provision reflects a Congressional intent to encourage seafarers to come forward with information regarding illegal pollution activities, which otherwise would be difficult to detect. It appears that "[m]ost, if not all, [APPS] prosecutions would not have been brought but for the willingness of these crew members to step forward and provide information [because t]he illegal discharges occur on the high seas under cover of darkness. . . . Crew member disclosures are essential to discovering and prosecuting the illegal conduct."⁹

The APPS permits the Court to exercise its discretion to provide a whistleblower award equal to not more than one-half of the fine paid. 33 U.S.C. § 1908(a). In this proceeding, in which the Defendants have paid a total of \$1,850,000 of fines, the total award could be as much as \$925,000. However, unlike some other statutes providing for whistleblower awards,¹⁰ the

⁹ James D. Oesterle, "Citizen Rewards" to Promote Environmental Crimes Prosecutions, Nat. Resources & Env't, Winter 2009, at 46.

¹⁰ For example, under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.), a whistleblower who voluntarily provides "original information" to the Securities and Exchange Commission ("SEC") leading to successful enforcement in a covered judicial or administrative action "shall" receive an award from the SEC of not less than 10%, but not more than 30%, "of what has been collected of the monetary sanctions imposed." Id. at § 922, 124 Stat. at 1841-42 (codified at 15 U.S.C. § 78u-6(b)(1)). The

APPS statute provides no guidance regarding the factors to consider in determining the amount of the award, other than mandating a range between zero and one-half of the fines paid. Nor is there meaningful guidance provided by the actions of district judges who have heretofore made APPS whistleblower awards.

As stated by counsel for Lopez:

When United States District Courts have offered any explanation for making an award under § 1908(a) - since in many cases, the Courts simply grant the United States' motion requesting an award - they almost invariably state something to the effect of "Upon consideration of the Motion of the United States and the entire record in this case, the Court finds that an award to these witnesses would further the purpose of the Act to Prevent Pollution from Ships."

ECF No. 30 (in MJG-11-0652) at 3.

The Government, while moving for a grant of the maximum possible award, as it has in the vast majority of APPS cases, recognizes that the maximum permissible award may not be the only appropriate award in the instant case. Government counsel stated at argument that the Court could decide, for a variety of

Dodd-Frank Act grants the SEC discretion in determining the amount of the whistleblower award, but requires the SEC to consider the significance of the information provided, the degree of assistance provided by the whistleblower and any legal representative of the whistleblower, the programmatic interest of the Commission, and any additional relevant factors as the Commission may establish.

reasons, to grant less than the maximum possible award, but not for reasons presented by Efploia.¹¹

It is common for district courts to grant a Government motion for the maximum possible award, often with little more discussion than a conclusory statement. This Court is not at all critical of the district courts that have done so, finding that, in the circumstances presented, it was obvious that the maximum possible award would be appropriate. However, the Court does not find such circumstances here presented to warrant the maximum possible award.

The Court, in considering how to exercise its discretion, has obtained from the parties what appears to be a comprehensive list of district court APPS whistleblower awards since 1993, a total of 70 cases. See Appendix A hereto. Of course, the compilation does not provide, and is not considered by the Court to be, a binding "guideline" for the determination of Lopez' award. Certainly, the list includes cases in which the award

¹¹ Efploia has taken the position that, in appropriate cases, a district court should decline to grant any whistleblower award at all. For example, where a defendant company - although subject to corporate guilt due to the action of an employee - had an effective system that would enable employees promptly to notify appropriate management upon observation of possible criminal conduct, or where a purported whistleblower unreasonably delayed making a report thus facilitating criminal conduct. However, the Court does not find the instant case to present such circumstances.

would have been greater had the maximum permissible award been greater.

The Court finds it appropriate to render a total award that is sufficient to provide incentive for seamen to inform the United States of violations of the MARPOL protocol. The Court finds that, in the instant case, a substantial award is warranted. However, by no means does it find that the maximum possible award is appropriate.

The Court is well aware that Lopez, like virtually every APPS whistleblower, has suffered a detriment to his career as a seaman. The Court has taken into account, for example, the fact that Lopez was required to reside in Maryland for eight months to prepare to give evidence at trial and the fact that he experienced certain delays in receiving his wages during that time. However, he was paid his full salary for that time, just as he would have been had he been practicing his occupation at sea, plus expenses.

Lopez claims that he has been unable to obtain employment in the Philippines or at sea since blowing the whistle. He contends that a combination of his age, the time he has been out of the shipping business related to the instant matters, and his history as a whistleblower has rendered him unemployable. The Court does not find, however, that he or his family have suffered any hardship not adequately compensated by the amount

that he has heretofore been paid and the additional amount that he will receive by virtue of the instant decision.

Hence, the Court does not find that the situation with regard to Lopez is extraordinary, and most certainly not so extraordinary as to warrant an award of \$925,000. Such an award would be exceeded by only one award in the 70 cases in which district courts have made such awards since 1993.

Counsel for Lopez has quoted the statement of counsel for a whistleblower in United States v. Consultores de Navegacion, S.A., 08-cr-10274 (D. Mass.) and a consolidated case, 09-cr-10049 (D. Mass.):

[The amount of an award] 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. . . .

. . . 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.

ECF No. 30 (in MJG-11-0652) at 3-4 (quoting Consultores, ECF No. 168 at 2-3).

The Court has considered this eloquent statement. However, the Court does not find that an award to Lopez in excess of one-

half million dollars would be inconsistent with the purpose of Congress or would be perceived by the "target audience" as "stingy." Indeed, the district court in the Consultores and consolidated cases, although presented with a maximum possible award of \$500,000,¹² awarded less – a total of \$400,000, \$207,500 to one whistleblower, and \$192,500 to another. Consultores, ECF No. 180.

The Court finds that a total award to Lopez of \$550,000, well over a half million dollars, is appropriate in the circumstances of the instant case and ample to provide incentive for prospective whistleblowers.¹³

Therefore, the Court hereby exercises its discretion to award Lopez a total whistleblower award of \$550,000.¹⁴

¹² Government counsel in the instant case has stated that the Consultores district court awarded the maximum available. However, the Consultores docket reflects that Government counsel stated to the Consultores court: "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. 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." Consultores, ECF No. 169 at 3.

¹³ The award to Lopez is exceeded by the awards to individual whistleblowers in only two of the 70 cases in which, since 1993, district courts have issued such awards.

¹⁴ There shall be an Order awarding \$87,500 in MJG-11-0652 that, together with the award of \$462,500 in MJG-11-0671, constitutes a total award of \$550,000.

III. COUNSEL'S CLAIMS

The Court is hereby providing Lopez a total award of \$550,000 of which the Clerk has heretofore paid \$380,000 to, or for, Lopez. The Clerk, therefore, now holds \$170,000¹⁵ payable to, or for, Lopez.

Current counsel for Lopez claims to be entitled to a 20% contingent fee which, applied to the \$550,000 total award, would be \$110,000. Thus, of the \$170,000 held by the Clerk, current counsel claims that \$110,000 should be paid to counsel and \$60,000 to Lopez.

The Government objects to the Court's enforcing the contingent fee agreement and contends that counsel is entitled to no further payment¹⁶ from the funds now held by the Clerk.

A. The Contingent Fee Agreement

As discussed herein, the Court finds that:

1. The contingent fee agreement does not apply to the whistleblower award to Lopez, and
2. If it did apply, it would be unenforceable as unethically excessive.

¹⁵ Total award of \$550,000, less \$380,000 paid to date, leaving a balance of \$170,000.

¹⁶ In addition to the \$10,000 previously paid.

1. The Contingent Fee is Inapplicable

On April 12, 2011, Lopez signed a "Contingency Fee Agreement," which states, as here pertinent:

Salvador Lopez (the "Client") has agreed to retain Simms Showers, LLP and J. Stephen Simms, P.C. (collectively "Counsel") to represent the Client's interests and to investigate and research the circumstances surrounding potential violation of the federal False Claims Act, 31 USC §§ 3729-3733, the United States Prevention of Pollution From Ships Act, 33 U.S.C. § 1908, any state false claims acts, other federal or state law, and other related common law and statutory causes of action, arising out of operation of the M/V AQUAROSA, Official Number 12268 ("Vessel"), Falcon Rederi A/S, Falcon Maritime AS [sic], Aquarosa Shipping A/S, Efploia Shipping Co SA, the Vessel's officers, or others, and/or their affiliates, subsidiaries, officers, directors, or employees (the "Matter"). This representation is intended specifically to include the representation of the Client in dealing with or litigating against any and all parties, including insurers, which Counsel concludes might be responsible in damages to the United States, States, and/or the Client.

. . . .

Attorneys Fee: Counsel shall be entitled to an attorney's fee of Twenty Percent (20%) of the Client's Recovery, whether that Recovery is as the result of settlement, judgment, or otherwise. . . .

. . . .

Expenses: Counsel will at their discretion advance such Expenses of the Matter that it deems necessary, including

the cost of attorney travel, deposition transcripts and expert fees. . . .

The Client shall not be required to reimburse Counsel for Expenses of the Matter.

ECF No. 35-2 (MJG-11-0652) at 1-2.

The contingent fee agreement does not refer to the whistleblower award that is the subject of counsel's claim in the instant proceeding. The only reference to the APPS is within the sentence stating:

to represent the Client's interests and to investigate and research the circumstances surrounding potential violation of the federal False Claims Act, 31 USC §§ 3729-3733, the United States Prevention of Pollution From Ships Act, 33 U.S.C. § 1908, any state false claims acts, other federal or state law, and other related common law and statutory causes of action.

Id. at 1. The agreement does not refer to the pending criminal investigation or any prosecution in which there would be any whistleblower award.

It would hardly be appropriate to find that a reasonable client, much less a ward of the Court such as Lopez, should be expected to understand that within this verbiage is an assignment to Mr. Simms of a right to 20% of an award for disclosures that had been made before he even met Mr. Simms.

Moreover, the agreement states:

This representation is intended specifically to include the representation of the Client

in dealing with or litigating against any and all parties, including insurers, which Counsel concludes might be responsible in damages to the United States, States, and/or the Client.

Id.

An effort to obtain a whistleblower award, to be paid by the Court from funds paid to the United States, is not in any sense an action against any party who might be responsible in damages to the United States, States, or Lopez.

The Court finds that the contingent fee agreement pertains to the contemplated False Claims Action and, possibly, to other claims against parties who would be liable to the United States, States, or Lopez. However, it does not apply to the whistleblower award Lopez has received in the instant case.

Moreover, as discussed below, were the contingent fee agreement to apply to the whistleblower award, it would be unenforceable as unethically excessive.

2. Unethically Excessive

If the contingent fee agreement were applicable to the whistleblower award at issue,¹⁷ it would be unethically excessive.

In United States v. Overseas Shipholding Grp., Inc., 625 F.3d 1 (1st Cir. 2010), the district court awarded \$437,500 to each of twelve whistleblowers. Id. at 6. An attorney representing two of them, who received awards totaling \$875,000, sought approval of a one-third contingent fee of \$291,667. Id. at 7. The district judge referred the matter to a Magistrate Judge who found the requested fees "unethically excessive," recommending a fee of \$25,000 per client. Id. The district judge agreed regarding the contingent fee, but disallowed the \$25,000 recommended fee as to one of the clients due to a perceived conflict of interest. Id.

On appeal, the United States Court of Appeals for the First Circuit held that the district court had not abused its

¹⁷ The contingent fee regarding the qui tam action referred to therein presents a different situation. In regard to the qui tam case, counsel was agreeing to undertake legal action to effectively "create the fund" from which the contingent fee would be collected. See, e.g., Richey v. Motion Indus., Inc., No. 3:07-CV-466, 2010 WL 1138295, at *5 (E.D. Tenn. Feb. 3, 2010), report and recommendation adopted, No. 3:07-CV-466, 2010 WL 1138298 (E.D. Tenn. Mar. 18, 2010) ("[T]he purpose of a contingent fee arrangement is to create a fund from which the fee can be paid at the conclusion of the proceedings.").

discretion in refusing to approve the contingent fee agreement but reversed the conflict of interest based disallowance of the recommended \$25,000 fee with regard to one of the clients. In so holding, the First Circuit stated:

[L]imitations on fees . . . are particularly appropriate in situations such as this where awarding an excessive fee to the attorney would itself undermine the objectives of the federal statutory scheme. The whole purpose of the discretionary award to whistleblowers under [APPS] is to create incentives for the whistleblower to take risks that may disadvantage the whistleblower in his relationship to his employer. The amount of the fee that will be siphoned off by the lawyer significantly affects the size of that award and the power of the incentive. The court in administering this statute is obligated to ensure his excessive legal fees will not diminish the statutory incentive.

Id. at 9.

The Court finds the decision of the First Circuit persuasive, justifying its refusal to enforce the agreement for a contingent fee applied to the whistleblower award to Lopez. Indeed, the instant case presents even stronger reasons to find the contingent fee unethically excessive than those presented in Overseas Shipholding. For example, counsel in Overseas Shipholding was court-appointed and represented the whistleblower as a material witness before Government counsel stated that he might be eligible for an APPS whistleblower award. Here, as noted, Lopez had been represented by Mr. Vitek

and had made the disclosures and been informed - prior to Mr. Simms obtaining Lopez as a client - that he might be receiving an award.

Moreover, as in Overseas Shipholding, "there [i]s reason to question whether [Lopez] w[as] in a position to make informed decisions about [his] representation." Id. at 12. Lopez is a "foreign national[] who w[as] sufficiently indigent to qualify for court-appointed counsel." Id. Indeed, Lopez - a Philippine seaman¹⁸ who spoke little or no English - signed an agreement to pay a 20%¹⁹ "contingent" fee for an award that was based on information he already had provided government investigators and

¹⁸ It is well settled that "the seaman has been given a special status in the maritime law as the ward of the admiralty, entitled to special protection of the law not extended to land employees." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting). In Harden v. Gordon, 11 F. Cas. 480, 485 (C.C.D. Me. 1823), Circuit Justice Story stated:

[T]hough not technically incapable of entering into a valid contract, [seamen] are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract, in which they engage.

¹⁹ The Court finds Mr. Simms' setting the contingency percentage to 20% rather than a higher percentage ineffective to cure its unethically excessive character.

prosecutors, first while unrepresented, and again while represented by Mr. Vitek, before Mr. Simms became his counsel.

Furthermore, the Fourth Circuit gives district courts greater latitude in determining the fairness of contingent fee arrangements than does the First Circuit. Compare In re Abrams & Abrams P.A., 605 F.3d 238, 243 (4th Cir. 2010) ("Nor is the reasonableness standard limited to the fee-shifting context. As we noted in Bergstrom v. Dalkon Shield Trust (In re A.H. Robins Co.), 'the law of this circuit has long been clear that federal district courts have inherent power and an obligation to limit attorneys' fees to a reasonable amount.'" (citation omitted)), with Quint v. A.E. Staley Mfg. Co., 84 F. App'x 101, 102 (1st Cir. 2003) ("[U]nlike statutory fees, which normally are delimited to 'reasonable' compensation, fee awards predicated upon fee agreements privately negotiated between attorney and client are reviewed more deferentially; in the sense that we will exercise our supervisory power to reduce a fee award predicated upon a fee agreement only in those 'exceptional circumstances' where the fee assessed by counsel is 'unethically excessive.'" (citation omitted)).

In the Fourth Circuit, "[t]he district courts' supervisory jurisdiction over contingent fee contracts for services rendered in cases before them is well-established." Allen v. United States, 606 F.2d 432, 435 (4th Cir. 1979). In Allen, the United

States Court of Appeals for the Fourth Circuit quoted from Dunn v. H. K. Porter Co., 602 F.2d 1105 (3d Cir. 1979), in which the Third Circuit stated:

Because contingency fee agreements are of special concern to the courts and are not to be enforced on the same basis as are ordinary commercial contracts, courts have the power to monitor such contracts either through rule-making or on an Ad hoc basis. . . .

Power flowing from this source has been exercised more frequently to protect those unable to bargain equally with their attorneys and who, as a result, are especially vulnerable to overreaching. However, it has also been exercised whenever a contingent fee agreement yields an unreasonable fee.

Id. at 1108-09 (internal citations omitted).

The Court concludes that if necessary, it can and should exercise its discretion to relieve Lopez of any obligations with regard to the whistleblower award that may have been imposed upon him by the contingent fee contract.

B. Other Fees and Expenses

1. Other Fees

The Government contends that any fee in excess of \$10,000 that would be paid by Lopez' funds would be excessive.

The Court finds the Government to have raised issues that need to be resolved in regard to a determination of the amount,

if any, of Lopez' funds held by the Clerk that should be paid to current counsel.

Since the contingent fee agreement is expressly applicable to the qui tam action, which resulted in no recovery, it would not be reasonable for a fee to be paid for services related to that litigation. Moreover, as to other services provided, there must be consideration of what counsel did and the actual reasonable value to Lopez of counsel. The issues will include, but not be limited to, the Government's contention that certain actions by Mr. Simms were unnecessary, of little if any value, and/or contrary to the interest of his client,²⁰ as well as the extent to which Lopez funds should be used to pay for counsel's time devoted to whistleblower award issues.

2. Personal Expenses Reimbursement

The Court notes that, within the statements provided by counsel, are references to certain payments that could be viewed as being for personal expenses. These include, for example, Lopez' medical expenses and his travel expenses to appear at the evidentiary hearing with regard to the whistleblower award.

²⁰ For example, without notice to Government counsel, Mr. Simms subjected Mr. Lopez to interviews by counsel for Aquarosa and Efploia without the protection of any immunity agreement and without a record of precisely what Lopez may have said.

The Government takes the position that the Court does not have authority to direct payment of Government funds (i.e., fine payments) for expenses. This appears to be correct but misses the point. The Clerk's payments of expenses would not be made from Government funds but would be made from Lopez' funds, i.e., the proceeds of his whistleblower award.²¹

The Government argues that it is not desirable for the Court to "become embroiled in the relationship between a whistleblower and creditors." ECF No. 76 at 2. While by no means "desirable," the Court necessarily is embroiled in such a relationship, as between Lopez and his current counsel, since Counsel seeks payment of the bulk of Lopez' funds held by the Clerk.

Certainly, in context, the expense reimbursement dispute may not be large. However, the Court shall direct the Clerk to pay to counsel, from Lopez' funds, amounts paid for personal expenses of Lopez. In this regard, the Court specifically finds that the cost to Lopez of his attendance at the evidentiary hearing in the instant case is appropriately considered a personal expense for present purposes and shall be reimbursed to counsel.

²¹ An award that was not "adjusted" so as to include payment of expenses.

3. Referral for Report and Recommendation

As was done by the district court in Overseas Shipping, the Court shall refer the fee and expense matter to a Magistrate Judge to conduct such proceedings as may be appropriate and to provide a report and recommendation. Thus, the Magistrate Judge shall recommend the amount, if any, that should be paid from the funds held by the Clerk for Lopez to counsel for legal fees and expenses.

IV. FINANCIAL STATUS

A. Principal

The Defendants have paid the Government a total of \$1,850,000 of fines. The Government has paid one-half of this amount, \$925,000, to the Clerk for disbursement pursuant to the Court's Order. To date, pursuant to Court Orders, the Clerk has paid Lopez \$370,000 and counsel \$10,000. Thus, the Clerk now holds a principal balance of \$545,000.

By virtue of the instant decision, the funds now held by the Clerk consist of, in addition to interest, \$170,000 to be paid to Lopez (subject to claims by counsel) and \$375,000 to be paid to the Government.

B. Interest

The funds received by the Government as fine payments, paid to the Clerk, and held by the Clerk, included and/or accrued interest.

The Court finds it appropriate to deem Lopez' whistleblower award to have been made nunc pro tunc to the date on which the fines were due from the defendants. Accordingly, the Court finds that Lopez is entitled to interest paid and accrued in regard to his ownership of the principal amount of \$550,000 of the \$925,000 fines paid. Cf. Phillips v. Wash. Legal Found., 524 U.S. 156, 165, 172 (1998) ("The rule that 'interest follows principal' has been established under English common law since at least the mid-1700's. . . . [W]e hold that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162 (1980) ("The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal.")

In the instant litigation, the Clerk received from the Government one-half of the principal amounts and interest paid by the defendants, i.e., \$925,000 plus interest. Interest has accrued on these funds while held by the Clerk. The Clerk has,

to date, paid nothing to the Government, \$370,000 to Lopez, and \$10,000 to counsel for Lopez, leaving \$545,000 of principal undistributed. As of April 22, 2016, the Clerk held a total of \$546,980.52 in regard to the instant matter, of which \$1,980.52 is interest.

The Court hereby provides Lopez an additional whistleblower award in the amount of \$87,500, bringing his total award up to a principal amount of \$550,000. Therefore, nunc pro tunc to the dates on which the fines were due to be paid, the ownership of the fine payments was:

Lopez	\$550,000	59.46 %
Government	\$375,000	40.54 %

Accordingly, when the Clerk distributes the funds pursuant to the final Order hereunder, the interest (less any pertinent registry fee) shall be distributed 59.46% to Lopez and 40.54% to the Government.

V. CONCLUSION

For the reasons stated herein:

1. Salvadore Lopez shall receive a total whistleblower award of \$550,000, consisting of:
 - a. An award of \$462,500 in MJG-11-0671,
 - b. An award of \$87,500 in MJG-11-0652, and
 - c. Interest as set forth herein.
2. By separate Order, the Court shall refer the case to a Magistrate Judge to conduct appropriate proceedings and provide a Report and Recommendation regarding the amount, if any, that shall be paid by the Clerk to counsel for legal fees and expenses.

SO ORDERED, this Friday, April 22, 2016.

/s/ _____
Marvin J. Garbis
United States District Judge

APPENDIX A

APPS Whistleblower Awards Authorized Pursuant to 33 U.S.C. § 1908(a)

	Case	Year	Total Whistleblower Award	Highest Award Per Capita
1	<u>United States v. OMI Corp.</u> , D.N.J., 2:04-cr-00060	2004	\$2,100,000	\$2,100,000
2	<u>United States v. Wallenius Ship Mgmt. Pte. Ltd.</u> , D.N.J., 2:06-cr-00213	2006	\$2,500,000 ¹	\$625,000
3	<u>United States v. Ionia Mgmt.</u> , D. Conn., 3:07-cr-00134	2011	\$1,400,000 ²	\$550,000
4	<u>United States v. Noble Drilling (U.S.) LLC</u> , D. Alaska, 3:14-cr-00114	2015	\$512,500	\$512,500
5	<u>United States v. Holland America Line</u> , D. Alaska	1998	\$500,000	\$500,000
6	<u>United States v. STX Pan Ocean Co. Ltd.</u> , M.D. Fla., 8:09-cr-00163	2009	\$500,000	\$500,000
8	<u>United States v. Overseas Shipholding Corp.</u> , D. Mass., 1:06-cr-10408	2007	\$5,250,000	\$437,500
9	<u>United States v. Fujitrans Corporation of Japan</u> , D. Or., 04-cr-00531, 00469	2005	\$360,000	\$360,000
10	<u>United States v. Carbofin S.P.A.</u> , M.D. Fla., 8:14-cr-00500	2015	\$1,075,000 ³	\$350,000
11	<u>United States v. Ilios Shipping Co.</u> , E.D. La., 2:11-cr-00286	2012	\$350,000	\$350,000
12	<u>United States v. Sabine Transport.</u> , N.D. Iowa, 1:03-cr-00063	2004	\$1,000,000	\$333,333
13	<u>United States v. Höegh Fleet Servs. A/S</u> , W.D. Wash., 03-cr-05765	2004	\$300,000	\$300,000
14	<u>United States v. Holy House Shipping AB</u> , D.N.J., 1:08-cr-00782	2009	\$375,000	\$300,000
15	<u>United States v. Hiong Guan Navegacion Japan Co. Ltd.</u> , M.D. Fla., 8:08-cr-00494	2009	\$337,500 ⁴	\$253,125
16	<u>United States v. Boyang (Busan) Ltd.</u> , D. Alaska, 05-cr-00035	2005	\$250,000	\$250,000

¹ Awards were given to 4 whistleblowers – 4 (\$625,000) = \$2,500,000.

² Awards were given to 7 whistleblowers – 1 (\$550,000) + 2 (\$350,000) + 1 (\$75,000) + 3 (\$25,000) = \$1,400,000.

³ Awards were given to 4 whistleblowers – 2 (\$350,000) + 1 (\$275,000) + 1 (100,000) = \$1,075,000.

⁴ Awards were given to 2 whistleblowers – 1 (\$253,125) + 1 (\$84,375) = \$337,500.

17	<u>United States v. Dianik Bross Shipping Corp.</u> , N.D. Cal., 3:11-cr-828	2011	\$250,000	\$250,000
18	<u>United States v. Hachiuma Steamship Co., LTD et al.</u> , D. Md., 1:15-CR-00005	2015	\$250,000	\$250,000
19	<u>United States v. Irika Maritime, S.A.</u> , W.D. Wash., 3:06-cr-05661	2007	\$250,000	\$250,000
20	<u>United States v. Irika Shipping S.A.</u> , D. Md., 1:10-cr-00372	2010	\$500,000 ⁵	\$250,000
21	<u>United States v. Noka Shipping Co. Ltd.</u> , S.D. Tex., 2:11-cr-00534	2011	\$250,000	\$250,000
22	<u>United States v. Norwegian Cruise Lines</u> , S.D. Fla., 1:02-cr-20631	2002	\$250,000	\$250,000
23	<u>United States v. Odfjell Asia II Pte Ltd. et al.</u> , D. Conn., 3:14-cr-00038, 00039	2014	\$500,000 ⁶	\$250,000
24	<u>United States v. Polar Tankers Inc.</u> , D. Alaska, 3:07-cr-00124	2007	\$250,000	\$250,000
25	<u>United States v. Princess Cruises</u> , S.D. Fla., 0:93-cr-06058	1993	\$250,000	\$250,000
26	<u>United States v. Target Ship Mgmt. Pte. Ltd.</u> , S.D. Ala., 1:11-cr-00368	2012	\$250,000	\$250,000
27	<u>United States v. Kassian Maritime Navigation Agency Ltd.</u> , M.D. Fla., 3:07-cr-00048	2007	\$500,000 ⁷	\$230,000
28	<u>United States v. Botelho Shipping Corp.</u> , D. Or., 3:03-cr-00506	2003	\$225,000	\$225,000
29	<u>United States v. Ciner Gemi Acente Isletni Sanayi Ve Ticaret S.A.</u> , D. Md., 1:15-cr-00616	2016	\$250,000 ⁸	\$225,000
30	<u>United States v. Fairmont Shipping (Canada) Ltd. et al.</u> , D. Or., 3:03-cr-00506	2003	\$225,000	\$225,000
31	<u>United States v. Consultores De Navegacion</u> , D. Mass., 1:08-cr-10274	2009	\$400,000 ⁹	\$207,500
32	<u>United States v. Fleet Mgmt. Ltd.</u> , S.D. Tex., 6:10-cr-00051	2010	\$200,000	\$200,000
33	<u>United States v. Transmar Shipping</u> , N.D. Cal., 4:10-cr-00552	2010	\$1,150,000	\$200,000

⁵ Awards were given to 4 whistleblowers – 1 (\$250,000) + 3 (\$83,333.33) = \$500,000.

⁶ Awards were given to 2 whistleblowers – 2 (\$250,000) = \$500,000.

⁷ Awards were given to 4 whistleblowers – 2 (\$230,000) + 2 (\$20,000) = \$500,000.

⁸ Awards were given to 2 whistleblowers – 1 (\$225,000) + 1 (\$25,000) = \$250,000.

⁹ Awards were given to 2 whistleblowers – 1 (\$207,500) + 1 (\$192,500) = \$400,000.

34	<u>United States v. Gulf Stolt Ship Management, E.D. La., 2:13-cr-00049, 00073</u>	2013	\$187,500	\$187,500
35	<u>United States v. Odysea Carriers, S.A., E.D. La., 2:12-cr-00105</u>	2012	\$183,000	\$183,000
36	<u>United States v. Clipper Marine Services, D.N.J., 2:07-cr-00264</u>	2008	\$650,000 ¹⁰	\$175,000
37	<u>United States v. AML Ship Management GMBH, D. Alaska, 15-cr-00007, 00018</u>	2015	\$150,000	\$150,000
38	<u>United States v. Cleopatra Shipping Agency, Ltd., M.D. La., 3:12-cr-00102</u>	2012	\$150,000	\$150,000
39	<u>United States v. Keoje Marine Co. Ltd., D. Haw., 1:11-cr-01258</u>	2012	\$150,000	\$150,000
40	<u>United States v. Crescent Ship Servs., Inc., E.D. La., 2:94-cr-00383</u>	1995	\$128,000	\$128,000
41	<u>United States v. Ofer (Ship Holding) Ltd., S.D. Ga., 4:08-cr-00103</u>	2008	\$140,000 ¹¹	\$126,000
42	<u>United States v. Reederei Karl Schlueter GmbH & Co. KG, E.D. Pa., 2:08-cr-00341</u>	2009	\$502,000	\$125,625
43	<u>United States v. Aksay Denizcilik Ve Ticaret A.S., M.D. Fla., 8:10-cr-00116</u>	2010	\$250,000	\$125,000
44	<u>United States v. Atlas Ship Mgmt. Ltd., M.D. Fla., 8:10-cr-00363</u>	2010	\$250,000	\$125,000
45	<u>United States v. Calypso Maritime Corp., W.D. Wa., 3:07-cr-05412</u>	2007	\$250,000	\$125,000
46	<u>United States v. Herm. Dauelsberg GMBH & Co. KG, C.D. Cal., 14-cr-00200</u>	2014	\$500,000 ¹²	\$125,000
47	<u>United States v. Columbia Shipmanagement (Deutschland) GmbH and Columbia Shipmanagement Ltd., D.N.J., 2:13-cr-00205</u>	2013	\$1,000,000	\$111,111
48	<u>United States v. Giuseppe Bottiglieri Shipping Co., S.D. Ala., 1:12-cr-00057</u>	2010	\$500,000 ¹³	\$110,000
49	<u>United States v. Marine Managers et al., E.D. La., 2:14-cr-00128</u>	2015	\$200,000 ¹⁴	\$100,000

¹⁰ Awards were given to 6 whistleblowers – 3 (\$175,000) + 2 (\$50,000) + 1 (25,000) = \$650,000.

¹¹ Awards were given to 3 whistleblowers – 1 (\$126,000) + 2 (\$7,000) = \$140,000.

¹² Awards were given to 4 whistleblowers – 4 (\$125,000) = \$500,000.

¹³ Awards were given to 5 whistleblowers – 4 (\$110,000) + 1 (\$60,000) = \$500,000.

¹⁴ Awards were given to 2 whistleblowers – 2 (\$100,000) = \$200,000.

50	<u>United States v. Diamlemos Shipping Corp.</u> , C.D. Cal., 2:08-cr-00265	2008	\$187,500	\$93,750
51	<u>United States v. General Maritime Mgmt. (Port.) L.D.A.</u> , S.D. Tex., 2:08-cr-00393	2009	\$250,000 ¹⁵	\$90,000
52	<u>United States v. Fairdeal Group Management</u> , S.D.N.Y., 1:05-cr-00750	2005	\$87,500	\$87,500
53	<u>United States v. STX et al.</u> , W.D. Wash., 3:08-cr-05653	2008	\$175,000 ¹⁶	\$87,500
54	<u>United States v. B. Navi Ship Management Services et al.</u> , S.D. Tex., 4:08-cr-00032, 00033	2008	\$300,000 ¹⁷	\$85,000
55	<u>United States v. Norbulk Shipping UK, Ltd</u> , D.N.J., 15-cr-00294	2015	\$249,999 ¹⁸	\$83,333
56	<u>United States v. Diana Shipping Services S.A., et al.</u> , E.D. Va., 2:13-cr-00040	2014	\$150,000 ¹⁹	\$75,000
57	<u>United States v. DST Shipping</u> , C.D. Cal., 04-cr-01728	2005	\$250,000 ²⁰	\$75,000
58	<u>United States v. Stanships, Inc.</u> , E.D. La., 2:10-cr-00172	2011	\$137,500 ²¹	\$68,750
59	<u>United States v. Nimmrich & Prahm Bereederung GMBH & Co.</u> , S.D. Tex., 4:12-cr-549	2012	\$200,000	\$66,667
60	<u>United States v. Sun Ace Shipping Co.</u> , D.N.J., 2:06-cr-00705	2006	\$200,000	\$66,667
61	<u>United States v. MK Shipmanagement Company, Ltd.</u> , D.N.J., 2:06-cr-00307	2006	\$100,000	\$65,000
62	<u>United States v. Casilda Shipping, Ltd. et al.</u> , N.D. Cal., 4:08-cr-00448	2009	\$250,000 ²²	\$62,500
63	<u>United States v. D/S Progress</u> , D. Md., 1:00-cr-00318	2002	\$125,000	\$62,500
64	<u>United States v. Styga Compania Naviera S.A.</u> , S.D. Tex., 4:09-cr-00572	2010	\$312,500 ²³	\$62,500

¹⁵ Awards were given to 5 whistleblowers – 1 (\$90,000) + 1 (\$70,000) + 3 (\$30,000) = \$250,000.

¹⁶ Awards were given to 2 whistleblowers – 2 (\$87,500) = \$175,000.

¹⁷ Awards were given to 6 whistleblowers – 1 (\$85,000) + 5 (\$43,000) = \$300,000.

¹⁸ Awards were given to 3 whistleblowers - 3 (\$83,333) = \$249,999.

¹⁹ Awards were given to 2 whistleblowers – 2 (\$75,000) = \$150,000.

²⁰ Awards were given to 4 whistleblowers – 3 (\$75,000) + 1 (\$25,000) = \$250,000.

²¹ Awards were given to 2 whistleblowers – 2 (\$68,750) = \$137,500.

²² Awards were given to 4 whistleblowers – 4 (\$62,500) = \$250,000.

²³ Awards were given to 5 whistleblowers – 5 (\$62,500) = \$312,500.

65	<u>United States v. Polembros Shipping Limited</u> , E.D. La., 2:09-cr-00252	2009	\$540,000	\$60,000
66	<u>United States v. Accord Ship Mgmt</u> , D.P.R., 3:07-cr-00390	2007	\$250,000	\$50,000
67	<u>United States v. Cooperative Success Marine</u> , E.D.N.C., 4:10-cr-00032	2010	\$200,000 ²⁴	\$50,000
68	<u>United States v. Regency Cruises, Inc.</u> , M.D. Fla., 8:94-cr-00245	1995	\$75,000 ²⁵	\$35,000
69	<u>United States v. Sanford Ltd. et al.</u> , D.D.C., 1:11-cr-00352	2013	\$79,167 ²⁶	\$26,389
70	<u>United States v. Ulysses Cruises, Inc., et al.</u> , S.D. Fla., 97-cr-00694	1998	\$25,000 ²⁷	\$12,500

²⁴ Awards were given to 4 whistleblowers – 4 (\$50,000) = \$200,000.

²⁵ Awards were given to 6 whistleblowers – 1 (\$35,000) + 1 (\$15,000) + 1 (\$10,000) + 3 (\$5,000) = \$75,000.

²⁶ Awards were given to 3 whistleblowers – 3 (\$26,389) = \$79,167.

²⁷ Awards were given to 2 whistleblowers – 2 (\$12,500) = \$25,000.