

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:08-Cr-00494-T-23EAJ

HIONG GUAN NAVEGACION
JAPAN CO., LTD.

UNITED STATES' MOTION IN SUPPORT OF STATUTORY MOIETY PAYMENTS

Pursuant to the Act to Prevent Pollution from Ships ("APPS"), the United States of America, by A. Brian Albritton, United States Attorney for the Middle District of Florida, files its motion in support of whistleblower awards and hereby moves this Court to order a total award of \$337,500, which is half the criminal fine paid by defendant Hiong Guan Navegacion Japan Co., LTD. ("HGNJ") for Counts Two and Four of the Information, to Ricardo Mercado and Jose Suganob, whose assistance led to the successful prosecution of this case. In support of its motion, the United States submits the following:

I. HGNJ's Fine and the Court's Award Authority

On November 20, 2008, HGNJ pleaded guilty to a Four Count Information. Counts Two and Four of the Information charged violations of the APPS, 33 U.S.C. § 1901 *et seq.* Specifically, as set forth in Count Two, on or about October 31, 2007, HGNJ knowingly failed to maintain an Oil Record Book ("ORB") for the *M/V Balsa-62* in which all operations involving the movement of oil, including all overboard discharges of waste oil sludge and oil-contaminated bilge waste, were fully recorded. In addition, as

set forth in Count Four, on or about May 31, 2008, HGNJ knowingly failed to maintain an ORB for the *M/V Balsa-62* in which all operations involving the movement of oil, including all overboard discharges of waste oil sludge and oil-contaminated bilge waste, were fully recorded. On February 24, 2009, at sentencing this Court imposed a total monetary penalty on the defendant of \$1.75 million; \$1.35 million was designated for the criminal fine and \$400,000 for the community service payment. Of the criminal fine amount of \$1,350,000, \$675,000 is attributable to the two APPS counts (Counts Two and Four).

APPS is designed to implement an international law treaty known as the MARPOL protocol, which sets forth international standards to protect the marine environment. In order to further this purpose, APPS grants a Court the discretion to issue a monetary award for up to one half of any criminal fine imposed to those who provide information that leads to a conviction under the Act.¹ Specifically, section 1908(a) of APPS provides that:

A person who knowingly violates the MARPOL 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 may be paid to the person giving information leading to conviction.

33 U.S.C. § 1908(a).

The APPS whistleblower award provision serves a valuable law enforcement purpose by encouraging those most likely to know of the illegal conduct, in this case engine room crew members, to report it. Because the discharge of oily waste typically

¹ The regulations implementing APPS contain the same provision. 33 C.F.R. § 151.04(c). The Rivers and Harbors Act contains a similar award provision. 33 U.S.C. § 411.

takes place in the middle of the ocean in international waters and often at night, the only persons likely to know about the conduct and the falsification of the ORB are engine room crew members. Absent crew members with firsthand knowledge of the illegal conduct coming forward, APPS violations are otherwise extremely difficult to uncover. The government's success in detecting the illegal activity and obtaining sufficient evidence to support investigations and prosecutions is dependent upon the willingness of crew members to step forward. In turn, crew members must assess the risks associated with coming forward, such as the possibility that the crew member will lose relatively lucrative employment and be blacklisted and barred from working in the marine shipping industry in the future. A substantial monetary award, as provided by APPS, both rewards the crew members for taking those risks and provides an incentive for other crew members to come forward and report illegal conduct on vessels in the future.

II. The Assistance Provided by Mercado and Suganob

Two crew members, Ricardo Mercado and Jose Suganob, provided key information during the initial phase of this investigation that substantially contributed to securing convictions against defendant HGNJ, as well as Chief Engineers Francisco Bagatela and Robert Racho.² An award to these witnesses would be consistent with

²At the sentencing hearing on February 24, 2009, the United States advised the Court that it knew of three witnesses who might be eligible for payments under the statute but that counsel for one of the witnesses couldn't locate the witness in the Philippines to confirm that the witness desired to be identified as a whistleblower. That witness still has not been located. Because the witness knew at least as early as November 2008 that he might be eligible for a whistleblower reward, but has apparently failed to provide his counsel with updated contact information, the United States is requesting that the Court consider apportioning the statutory moiety between Messrs. Mercado and Suganob.

the valuable law enforcement purpose of APPS to encourage those with information about unlawful conduct to come forward and disclose that information to authorities, information that would otherwise be difficult, if not impossible, to obtain.

Ricardo T. Mercado, Jr.

Mr. Mercado was the Fourth Engineer onboard the *M/V Balsa 62*. Mr. Mercado first attempted to contact the USCG in the fall-winter of 2007 when the vessel was in the region of South America. Mr. Mercado's efforts to report illegal conduct aboard the *M/V Balsa 62* continued his efforts when the *M/V Balsa 62* arrived at the Port of New Orleans, New Orleans, Louisiana, on or about May 28, 2008. When the United States Coast Guard ("USCG") boarded the *M/V Balsa 62* as part of a routine inspection, Mr. Mercado handed off a compact disk containing photographic evidence of a "magic pipe," being used to transfer oily waste and sludge directly overboard.

By the time the evidence from the compact disk had been reviewed by the USCG, the *M/V Balsa 62* had left the Port of New Orleans and was on its way to the Port of Tampa, Tampa, Florida. Upon arrival at the Port of Tampa on or about May 31, 2008, the *M/V Balsa 62* was boarded and inspected by the USCG. Mr. Mercado was questioned by USCG and explained in full detail how the "magic pipe" was connected, during what shift the bypassing of pollution prevention equipment occurred, how often the bypassing occurred, and that the bypassing was done at the direction of both Chief Engineers. Mr. Mercado explained that the bypassing would start during his shift and end during the Third Engineer's shift; he described how the bypassing occurred at night so as not be visible. He also noted that Chief Engineer Bagatela did not use the

incinerator to burn oily sludge but instead ordered the sludge to be pumped overboard via the magic pipe.

Given Mr. Mercado's significant role in alerting the USCG to the illegal conduct aboard the *M/V Balsa 62*, the United States recommends that an award of \$253,125 (75% of the total proposed award of \$337,500) be issued to Mr. Mercado.

Jose S. Suganob

Mr. Suganob was the Third Engineer onboard the *M/V Balsa 62*. He assisted Mr. Mercado in making contact with the USCG in New Orleans. During the Port of Tampa USCG inspection, Mr. Suganob openly acknowledged seeing the magic pipe in use and that both Chief Engineers gave the order to use the pipe. He stated that the incinerator was not used for oily waste or sludge; he described seeing entries in the Oil Record Book that were false because the entries indicated that the incinerator was being used when in fact it was not.

Given the corroborating evidence provided by Mr. Suganob, the United States recommends an award of \$84,375 (25% of the total proposed award of \$337,500) to Mr. Suganob.

Contributions from the Witnesses

Both witnesses, who are Filipino citizens, agreed to remain in the United States in order to assist with the investigation and provide testimonial evidence. The witnesses remained in the United States from the end of May 2008 to November 8 (Suganob) and November 24, 2008 (Mercado) to assist with the prosecution of this

case.³ During that time, each of the witnesses participated in interviews with government representatives during which they detailed the APPS violations that occurred on board the *M/V Balsa 62*. Because these witnesses worked different shifts on board the vessel, they were able to provide details on how the engine room operated while under the command of both Chief Engineers Bagatela and Racho.

In addition, the witnesses suffered significant hardship as a result of their assistance. They spent almost six months sharing motel rooms in a foreign country, separated from family and friends. It is the understanding of the United States based on witness interviews that the whistleblowers are seriously concerned that they will face the prospect of being black-listed in the maritime industry as a result of their cooperation with the United States in this case. It is also the understanding of the United States based on speaking with witnesses and their counsel that the witnesses fear that due to the high unemployment rate in the Philippines, they may go without any income for a significant period of time.

Without the initial contact by Mr. Mercado and the subsequent information provided by both witnesses during their interviews, it is unlikely that the illegal conduct of the defendants would have been uncovered.

³ HGNJ agreed to pay for the witnesses' room, board, salary and travel to the end of November under an agreement with the USCG, which was a condition for allowing the ship to depart Tampa. HGNJ then agreed pursuant to the plea agreement to continue paying the crew members' expenses until the United States cleared them for repatriation to the Philippines or HGNJ's entry of its plea of guilty, whichever was earlier. Plea Agreement, ¶ 10 at p. 8.

III. The History of Awards

As set forth below, there have been many other cases in which an award has been issued pursuant to Section 1908 of APPS:

- United States v. Kassian Maritime Navigation Agency Ltd. et al., No. 3:07-CR-00048 (M.D. Fla. August, 16, 2007): award of \$230,000 each to the Ship's Wiper and Cook and \$20,000 to two Third Engineers.
- United States v. Sun Ace Shipping Company et al., No. 2:06-CR-00599 (D.N.J. December 2006): award of \$200,000 split evenly between three engine room crew members.
- United States v. MK Shipmanagement Co., Ltd., Criminal Docket No. 2:06-cr-00307-WHW (D.N.J., Aug 7, 2006): award of one half of the \$200,000 fine to two crew member whistle blowers.
- United States v. Wallenius Ship Management PTE. Ltd., Criminal Docket No. 2:06-cr-00213-JAG-ALL (D.N.J., Aug. 3, 2006): award of one half of the \$5 million fine to four crew member whistle blowers.
- United States v. OMI Corporation, Criminal Docket No. 2:04-cr-00060-KSH-ALL (D.N.J., Aug. 6, 2004): award of one half of the \$4.2 million fine to a crew member whistle blower.

IV. Conclusion

This Court has discretion to award an amount up to one-half of the criminal fine imposed in connection with Counts Two and Four of the Information to two witnesses, Ricardo T. Mercado, Jr. and Jose S. Sukanob, who provided critical evidence leading to the defendant's conviction. In light of the information provided by the witnesses, the United States respectfully moves this Court to find that an award in this matter would be consistent with the law enforcement purpose of the statute by encouraging those with information to come forward and disclose that information to appropriate authorities. The United States therefore respectfully requests that the Court award \$253,125 to

Ricardo T. Mercado, Jr. and \$84,375 to Jose S. Suganob in recognition of their contributions to the successful prosecution of this matter. Should the Court grant this motion, the United States requests that the Clerk of Courts issue checks to each witness in the designated amount and mail those checks in care of counsel for the witnesses at the following address:

Ricardo T. Mercado, Jr.
c/o Peter E. George
George and Titus, P.A.
100 S. Ashley Drive, Suite 1290
Tampa, Florida 33602

Jose S. Suganob
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Michael Chalos, Esquire

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