UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	**2:14-CR-39-VLB**
	:	
v.	:	
	:	**July 18, 2014**
ODFJELL ASIA II PTE LTD.	:	

ORDER GRANTING THE GOVERNMENT'S MOTION FOR WHISTLEBLOWER AWARD [Dkt. No. 18]

I. BACKGROUND

Before the court is the Government's May 1st, 2014 motion seeking the granting of whistleblower awards of $225,000 each to Jason Doromal ("Doromal") and Noel Sevilleno ("Sevilleno"). [Dkt. No. 18.] Messrs. Doromal and Sevilleno notified the United States Coast Guard ("USCG") of illegal discharges that occurred on the *M/T Bow Lind*, the ship on which they were crew members, and provided evidence leading to the conviction of defendant Odfjell Asia II PTE Ltd. ("Odfjell"), which owns and operates the *M/T Bow Lind*. The court entered an order granting the Government's motion on May 14, 2014, but vacated that order when notified at the sentencing hearing held later in the day on May 14, 2014 that Odfjell intended to oppose the whistleblower awards, and granted Odfjell leave to file a written opposition. Odfjell filed that written opposition on May 29, 2014, and the Government filed a reply brief in support of the whistleblower awards on June 17, 2014.

On March 3, 2014, Odfjell waived its right to be indicted and plead guilty to a one count information charging it with a knowing violation of the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. § 1908(a). Section 1908(a) provides that

"A person who knowingly violates the MARPOL Protocol, Annex IV to the Antarctic Protocol, this Act, or the regulations issued thereunder commits a class D felony." Odfjell and the Government entered into a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(c), by which Odfjell agreed to pay a criminal fine of $900,000. Plea Agreement at 4. Pursuant to section 1908(a): "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." Because Odfjell has paid a fine of $900,000, the court may award up to $450,000 to the whistleblowers in this case. The Government has asked that the court award the full amount of $450,000, divided evenly between the two whistleblowers.

As described in the stipulation of offense conduct attached to defendant's plea agreement, there were three illegal discharges from defendant's ship during the relevant time period, all of which were directed and caused by the ship's Second Engineer. The first discharge occurred on October 7, 2011. The whistleblowers Sevilleno and Doromal began serving on the *M/T Bow Lind* in March and April of 2012, respectively, and thus neither whistleblower was on board during the first discharge. Opp., Russo Aff., Exs. C & D. The second discharge occurred on July 29, 2012. Doromal apparently made a video of this discharge, which was later provided to the USCG. Opp., Russo Aff., Ex. C. The third and final discharge occurred October 16, 2012. The whistleblowers informed the USCG of the July and October 2012 discharges shortly before the boat was boarded and inspected on November 6, 2012, at New Haven,

Connecticut. It is undisputed that Doromal and Sevilleno gave information to the Government that lead to Odfjell's conviction.

II. DISCUSSION

By its text, the statute leaves the granting of any whistleblower award to the court's discretion. Odfjell asserts that Sevilleno and Doromal purposely ignored Odfjell's internal reporting mechanism, and instead chose to wait until the ship was in U.S. waters to report the illegal discharge they had witnessed. Odfjell argues that rewarding such behavior undermines the purpose of the statute, as it incentivizes crew members to ignore available internal reporting mechanisms, which thwarts the company's efforts to comply with the statute. Opp. at 14-15. Defendant asserts that the October discharge would not have occurred had the whistleblowers brought their evidence to Odfjell, which would have allowed Odfjell to respond and prevent further discharges. Odfjell also asserts that had the company been alerted after the July discharges, the company may have been able to avail itself of self-reporting procedures that may have allowed the company to avoid criminal prosecution. Opp. at 16-17.

Although Defendant cites to no authority regarding whistleblower awards under section 1908(a), defendant cites to precedent regarding whistleblower awards under other environmental statutes. Opp. at 15. Defendant also cites to the regulations implementing the whistleblower provision under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Opp. at 15-16. While that authority is instructive in the Court's consideration of the issues presented it is neither controlling nor compelling.

The court does not find Odfjell's citation to *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474 (3rd Cir. 1993) to be persuasive. That court was not considering the question of whether a whistleblower should receive an award. Rather, that court was considering whether the Clean Water Act's whistleblower provision should extend to employees who make internal reports, or whether it should be limited to employees who alert governmental agencies. In deciding that the whistleblower protections should be extended to employees who raise internal complaints, that court did recognize that "it is most appropriate" that employees raise their complaints internally before making external complaints. 992 F.2d at 478. However, this does not command that a whistleblower should be denied an award for bypassing the internal reporting structures.

The court also does not find the citation to the regulations implementing the Dodd-Frank Act's whistleblower provision to be persuasive. Those regulations permit the Securities and Exchange Commission (the "SEC") to consider whether "the whistleblower was aware of the relevant facts but failed to take reasonable steps to report or prevent the violations from occurring or continuing." 17 C.F.R. 240.21F-6(b)(2)(i). The regulations also allow the SEC to consider whether "there was a legitimate reason for the whistleblower to delay reporting the violations." 17 C.F.R. 240.21F-6(b)(2)(iii). Although Odfjell asserts that the whistleblowers failed to take steps that could have prevented the October 2012 discharge, there is also evidence in the record that suggests that they may have feared for their safety. In the context of the Dodd-Frank Act the SEC may

also consider whether the whistleblower actively "undermined the integrity" of the reporting system. 17 C.F.R. 240.21F-6(b)(3). There is no evidence that the whistleblowers did that here.

A. Motives of the Whistleblowers

In support of their assertion that the whistleblowers purposefully declined to report the discharge internally in an attempt to receive a whistleblower award in the United States, Defendant has provided a declaration from another crew member serving on the *M/T Bow Lind* with the whistleblowers, Vincent Oracion. Oracion asserts that in September or October 2012, while sailing from Houston, Texas to Brazil, he overheard Sevilleno, possibly in the presence of Doromal, state that he was waiting to report the July 2012 discharge until he reached the United States so that he could claim a whistleblower award. Opp., Oracion Decl.

Oracion's declaration states that the ship was sailing from Houston, Texas to Brazil when he overheard the whistleblower's conversation. If the ship was in Houston, Texas shortly after the July 2012 discharge, that fact undermines defendant's argument, as it is unclear why the whistleblowers would have waited until November 2012 to contact U.S. authorities, thereby risking the loss of their potential award by having someone else report the discharge internally. Had the whistleblowers wanted to wait until they reached the United States, they would have notified the U. S. Coast Guard in Houston and turned over the video recording of the July 2012 illegal discharge.

Oracion's declaration is contradicted by the Government's report of its interview with Doromal, which states that Sevilleno told Doromal in October 2012

that he intended to report the illegal activity to the company, but then later decided it would be better to report the activity to the USCG. Opp., Russo Aff., Ex. D. The Government's report of an interview with another crewmember serving on the *M/T Bow Lind*, Jerry Gonzales, states that Gonzales "is unaware why each of them [Sevilleno and Doromal] made a video other than maybe to show it to the main office (Odfjell) when they return to the Philippines." Opp., Russo Aff., Ex. E. Gonzales further stated that "Doromal was nervous about making the report to the USCG because he might lose his job." Opp., Russo Aff., Ex. E. During his interview with the USCG, Gonzales stated that he was hesitant to speak about the discharge because he had concerns for his family's safety, and that he had been afraid to speak with the USCG during their inspection of the ship. Opp., Russo Aff., Ex. E.

B. Odfjell's Internal Reporting System

Defendant argues that Doromal and Sevilleno should have availed themselves of defendant's robust internal reporting system. Defendant asserts that the whistleblowers were specifically reminded of their internal reporting obligations in June 2012, when a bulletin was issued to all of the crewmembers throughout Odfjell's fleet. Opp. at 5. The bulletin was to be posted on a bulletin board in the *M/T Bow Lind*, and was to be read by all crewmembers either on their computers or in hard copy. Opp. at 5. The bulletin stated:

> **It will be in the best interest of all employees as well as the company in general to eradicate malpractices and violations in all shapes and forms, and I expect you all to participate both through your own actions and through vigilant reporting of observed violations.**

> **To alleviate any fear that reporting violations could have negative consequences for the employee reporting I quote from the Code of Conduct chapter on "Notification about suspected malpractice":**
> ***Should an employee become aware of any infringement or suspected infringement of the Code, the issue shall be raised with a superior. If this is deemed difficult, the employee is kindly requested to notify the Compliance officer, discretion may be requested.***
> ***No employee shall be discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against as a result of reporting a breach of this code, or any other company policy or procedure (whistle blowing).***

Opp. at 5; Opp., Russo Aff., Ex. B. The bulletin also provided the email and telephone numbers for the company compliance officer.

Odfjell further asserts that all of its crewmembers are trained on the company's "Open Reporting System," and "are knowledgeable on how and to whom environmental violations are to be immediately reported." Opp. at 12. Odfjell's employees must complete a mandatory "Pre Departure Orientation Seminar" which covers compliance with Marpol Protocol and whistleblowing. Opp. at 12. Odfjell also notes that placards with the contact details necessary for reporting environmental violations were "conspicuously placed" on board the *M/T Bow Lind*. Opp. at 12. Further, despite alleging to having had policies and procedures to ensure that it met all regulatory, industry and company requirements for environmental and other standards and having conducted numerous internal and external inspections and audits during 2011-2012, one of which took place in Santos, Brazil on September 23, 2012, the July 2012 illegal discharge occurred and was not detected by the audit. [Dkt. No. 30]

The Government asserts that Odfjell's reporting system is ineffective, and thus the whistleblower award is appropriate and necessary to achieve the aims of

the statute. The Government argues that the illegal discharges would have been known to as many as seventeen (17) crewmembers on the *M/T Bow Lind*, and that none of those employees utilized Odfjell's internal reporting system to report any of the illegal discharges, The declaration from Vincent Oracion supports the Government's assertion that Odfjell's reporting system is ineffective. Oracion himself took no action, despite overhearing Sevilleno's statement that he had evidence of an illegal discharge. Had Oracion himself taken action after hearing that statement it is possible that the October discharge may have been prevented. The fact that Oracion did not report the discharges and collect the reward suggests there was a strong disincentive not to report or a culture of not reporting discharges either to the company or the authorities despite the company's avowed good intentions.

As further evidence that the reporting system was ineffectual, despite the fact that the discharges were open and notorious none of the other crew members reported them. In order to perpetrate this crime, the crew had to lay conduits through the vessel. This flagrant act perpetrated under the direction of the second engineer could not have gone unobserved by the other crew members in the vicinity. Despite the first illegal discharge, in October 2011, having occurred before either of the whistleblowers was serving on the Odfjell, no one reported the discharge to the company.

It is not clear from the documents before the court how a potential whistleblower is to deal with the consequences of reporting on someone with whom he is at sea. In his declaration, Odfjell's Senior VP Helge Olsen states that

"to the extent any crewmember purposefully violates MARPOL, that crewmember would be terminated." Opp., Olsen Decl. at ¶ 20. It seems reasonable to believe that a whistleblower may fear harassment or physical harm from a colleague who may lose his or her job after a whistleblower submits a report to their employer. This is supported by the statements made to the USCG by the whistleblowers' colleague Gonzales, who stated that he was initially reluctant to speak to the USCG because he had concerns for his family's safety.

What is clear is that the Company provided no protection for whistleblowers against retaliation, despite their vulnerability on the high seas. The affidavit of Toralf Sorenes, the Compliance Officer for Odfjell listed the actions he would have taken had the discharges been reported. He would have taken no steps to protect the whistleblowers against retaliation despite their vulnerability on the high seas, nor does he state that they would be assured job security. [Dkt. No. 32]

III. Standing

The Government briefly raised the question of Odfjell's standing to challenge the whistleblower award at Odfjell's sentencing hearing. In its opposition brief, Odfjell asserts that because the court has discretion in granting the whistleblower award, the court may, at its discretion, consider the arguments of defendant in deciding whether to grant the whistleblower award, and that it is common for courts to consider input from all parties including the defendant shipowner. Opp. at 18-19. The Government's reply brief does not address the

issue of Odfjell's standing to oppose the whistleblower brief, and the court sees no reason to rule on standing in this opinion, and will not reach the issue.

The Court GRANTS the Government's May 1st, 2014 motion for whistleblower awards of $225,000 each to Jason Doromal and Noel Sevilleno.

SO ORDERED, this 18th day of July, 2014 at Hartford, Connecticut.

_____/s/_____
Vanessa L. Bryant,
United States District Judge