

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
v.	)Civil Action No.05-10192-WGY
	)
ONE STAR CLASS SLOOP SAILBOAT	)
BUILT IN 1930 WITH HULL NUMBER 721,	)
NAMED " <i>FLASH II</i> ,"	)
Defendant.	)

**GOVERNMENT'S BRIEF REGARDING
CROSBY'S INTEREST IN THE DEFENDANT RES**

In the Court's Memorandum of Decision dated October 1, 2007, Docket Entry 81, the Court held that the defendant Flash II was not forfeitable, and that Claimant Kerry Scott Lane ("Lane") is entitled to recover the \$100,000 received for the Flash II at auction less "the sum paid to Crosby should the government successfully prove that Crosby's proportional share of the \$100,000 was at least equal to the amount paid him." Opinion at 19. The government reserves its right to appeal those holdings, but pursuant to this Court's order respectfully submits this brief regarding Crosby's interest in the Flash II.

The government executed a Settlement Agreement (the "Settlement Agreement") with Crosby on June 20, 2005, Docket Entry 14, and Crosby was paid \$26,101.24 under the terms of the Settlement Agreement. Under any calculation, the amount paid by the government to Crosby was less than Crosby's proportional share of the value of the sailboat. Moreover, the government respectfully asserts that the Lane should be estopped from contesting the amount paid to Crosby by the government. Accordingly, the government submits that the amount payable to Lane under the Court's Memorandum and Decision would be \$73,898.76.

I. Lane's Own Evidence Establishes That Crosby Was Entitled to At Least \$26,101.24

After this Court issued a default judgment in this case, Lane filed a Motion to Set Aside the Forfeiture (Docket 16), a Motion to Alter the Judgment (Docket 19), and a Motion to File a Reply Brief (Docket 23). In support of the last motion, Lane presented a document dated 12/4/97 (the "12/4/97 Statement") asserting his interest in the Flash II. [Docket Entry 23-3, pp.11-12, Exhibit D].¹ At the May 24, 2007 Bench Trial in this matter, the Court credited the 12/4/97 Statement, asserting: "I'm placing a fair amount of – this is Exhibit 6 – a fair amount of weight on this." Transcript, May 24, 2007 Bench Trial, at p. 59.

Under the 12/4/97 Statement, the sales proceeds of the Flash II were to be paid out according to a hierarchy, with payments to the lawyer to be made first (item A), then repayments of funds advanced (items B and C), and finally, if funds remained, distribution of profits, by percentages. The distributions to Crosby² and Lane were to be as follows:³

B.	Eddie Crosby	\$11,000
	Kerry Lane	\$60,000
C.	Eddie Crosby	\$10,000
	Kerry Lane	\$10,000

Attachment I, 12/4/97 Statement, at page 1 of 2.

Items D through F then specify how the percentage of any remaining profits will be

¹This document has been submitted at other times in this litigation, including as Exhibit 6 in the May 24, 2007 Bench Trial in this case. Lane adopted the 12/4/97 Statement during his testimony. Bench Trial at p.79. For the Court's convenience, the 12/4/97 Statement is attached hereto as Attachment I.

²Claimant Harry E. Crosby is listed on the 12/4/97 Statement by his nickname Eddie Crosby.

³Other persons are listed on the 12/4/97 Statement. However, those persons have not filed a claim in this proceeding.

distributed. Id. at page 2 of 2. According to Item D, Crosby was to receive 16.6 % of the profits. Id. Item E specifies that this 16.6 % will be paid “in addition to his \$11,000 payment in Section B.” Id. Lane is also addressed in Item D. Id. However, according to Item F, “Kerry Lane will be paid \$60,000 OR 30% of Figure 3,⁴ whichever is greater. Id. His initial payment of \$60,000 in Section B will be deducted from his 30% should the 30% figure be greater than \$60K.” Id.

Accordingly, the initial sales proceeds of the Flash II were to be paid as follows: Crosby would receive \$11,000 from the first payment and \$10,000 from the second, for a total of \$21,000; Lane would receive \$10,000 plus either \$60,000 or a percentage of the remainder, whichever was greater. Therefore, Lane was to receive either \$60,000 or his comparative share of the proceeds after the mandatory payments, whichever was greater. On proceeds of \$100,000, the fixed payments (\$21,000 to Crosby and \$10,000 to Lane) left a balance of \$69,000. From this amount, clearly \$60,000 is higher than the proportional share.⁵ By contrast, under Item E, Crosby was to receive his percentage in addition to, rather than lieu of, the initial fixed sum payments. Therefore, when Lane received the \$60,000, Crosby would receive the remaining balance. The final allocation under the 12/4/97 Statement would therefore be \$70,000 to Lane and \$30,000 to Crosby.

II. Under Crosby’s 12/24/96 Contract With Anderson, Crosby Was Entitled to a Greater Share

Crosby testified that he never saw the 12/4/97 Statement. [Deposition of Harry E.

⁴Figure 3 is the remainder of the Sales Proceeds after Items A, B, and C are deducted.

⁵The proportional share in this case, with no other persons having filed a claim, is calculated by taking Lane’s portion as a fraction of the two shares: $[30/(16.6 + 30)]$, or 64.38%. Lane’s proportional share of \$69,000 would therefore be \$44,421.

Crosby on 9/19/07, (“Crosby Depo”), at page 44, attached as Attachment II].⁶ However, he testified that he executed an agreement with Ole Anderson on December 24, 1996 (“12/24/96 Crosby Agreement”, Attachment III)⁷ that contained, as to Crosby, the same terms. Under the 12/24/96 Crosby Agreement, Crosby was to receive \$21,000 from the proceeds of sale of the Flash II, plus 16.6 % of any profit after other mandatory payments. The 12/24/96 Crosby Agreement and the 12/4/97 Statement (which Crosby never saw) differ in the amount of investments and costs payable to persons other than Crosby, prior to the payment of the profit percentage. According to the 12/24/96 Crosby Agreement, Lane was to receive only \$50,000 before the percentage payments were made. Therefore, under the 12/24/96 Crosby Agreement, Crosby would be allocated \$21,000 plus \$11,572⁸, or \$32,572 of the proceeds.

III. Lane Should Be Estopped From Challenging the Government’s Settlement With Crosby

While the government contends that the amount it paid Crosby was actually less than his allocable share of the proceeds under this Court’s October 1, 2007 Order, even it were not, Lane should be estopped from challenging the share paid to Crosby.

As this Court and the United States Court of Appeals for the First Circuit have both

⁶The 12/4/97 Statement was marked as Exhibit 177 in that deposition, based on the Bates Numbering from attorney Robert E. Harper’s files. The exhibit in deposition form is attached to the deposition for the Court’s convenience.

⁷The 12/24/96 Crosby Agreement was referred to as Exhibit 38 in the Crosby Deposition, based on the Bates Numbering from attorney Robert E. Harper’s files. Crosby acknowledged his signature on the document during his deposition. Crosby Depo, at p.39, Attachment II.

⁸The two claimants were to receive 16.6% and 25%, respectively. Therefore, Crosby’s pro rata share was $16.6/[16.6+25]$ or 39.9%. Applying this percentage to the \$29,000 remaining after Crosby and Lane were provided their \$21,000 and \$50,000 respective fixed payments yields \$11,572.

observed, Lane knew of the seizure of the Flash II by the Drug Enforcement Administration (“DEA”). While Crosby came forward timely and filed a claim, Lane hid. The First Circuit asserted that Lane’s conduct could be taken into consideration for equitable considerations if the government was prejudiced by it.⁹

The government respectfully submits that equity should foreclose Lane from challenging the amount paid to Crosby under the Settlement Agreement. The government executed the settlement with Crosby on June 20, 2005, more than eight months after Lane admits he learned of the seizure of the Flash II by the DEA. While Crosby testified that he knew the name of the doctor who had invested money in the Flash II,¹⁰ the government notes that prior to execution of the Settlement Agreement, Crosby was an adverse party to the government, with no incentive to assist the government in locating additional claimants. Indeed, Crosby also testified that he knew that the doctor had been told of the seizure of the boat in the same manner that Crosby had, Docket 41-3 at ¶ 13, and that he knew “the doctor did not want to be involved.” *Id.* More emphatically, Crosby testified that “the doctor did not want anything to do with it.” *Id.* Therefore, there is no basis in the record to assert that the government could have located Lane

⁹“Although notice of seizure is not tantamount to notice of forfeiture. . . , the fact that Lane had notice of the seizure and the further fact that Lane asked Anderson not to disclose his name are not necessarily irrelevant to the final outcome of the Rule 60(b) motion. The government remains free to argue, for example, that equitable considerations – especially any prejudice that it may have suffered through delay or concealment by Lane – should be taken into consideration.” United States v. One Star Class Sloop Sailboat Built in 1930 with Hull Number 721, Named “Flash II”, 458 F.3d 16, 25 n.10 (1st Cir. 2006).

¹⁰Docket 41-3. The October 1, 2007 Opinion erroneously attributes this filing to Lane. Memorandum of Decision at 5. While the testimony was helpful to Lane, it was actually submitted by the government in its case, consistent with the government’s duty of candor to the Court.

through Crosby **prior** to executing a binding Settlement Agreement with Crosby.¹¹

Instead, the record shows that Crosby has been hostile to Lane's claim of interest. Crosby (not the government) opposed Lane's motion to stay the sale of Flash II pending appeal, Docket 27, and Crosby successfully quashed Lane's attempt to seek documents from him. Docket 43-1.

If Lane had come forward, as Crosby did, at the time that Anderson informed both claimants of the DEA's seizure of the Flash II, the government could have evaluated both of their claims of ownership simultaneously, and could have addressed any dispute between them as to their proportional share pursuant to 28 U.S.C. § 2465(C). Instead, because Lane hid, the government had only Crosby's assertions regarding his ownership interest, which was fully supported by contemporaneous records submitted to the government by Crosby's counsel that were consistent with the information about ownership already in the government's possession. See Docket 41-3 at pages 4-6 (proof of payment by Harry E. Crosby); Crosby Depo at 11-13; Affidavit of Thomas Kerner, attached as Attachment IV.

Under these circumstances, the government respectfully submits that equity bars Lane from challenging the government's settlement with Crosby, and the Court should confine Lane's award to the excess of the amount received for the Flash II over the amount paid to Crosby under the Settlement Agreement.

CONCLUSION

For the reasons set forth above, the government asserts that the amount paid to Crosby

¹¹The First Circuit had speculated that Crosby "presumably had a copy of the December 1997 profit-sharing agreement that listed the owners of the Flash." 458 F.3d 16, 25 n.9 To the contrary, Crosby testified that he had never seen this item. Crosby Depo at 44.

under the Settlement Agreement did not exceed Crosby's appropriate share. Moreover, Crosby should be estopped from challenging the Settlement Agreement. Accordingly, while the government respectfully reserves its right to appeal the Court's Memorandum and Decision (and to move to stay any award pending appeal, if appropriate), the evidence in this case proves that Court should fully credit the amount that the government paid to Crosby when calculating its award to Lane, yielding a final award of \$73,898.76.

Respectfully submitted,

MICHAEL J. SULLIVAN
United States Attorney

By: /s/ Nancy Rue
Nancy Rue
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that these documents filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Nancy Rue
Nancy Rue
Assistant U.S. Attorney