UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. ONE STAR CLASS SLOOP SAILBOAT BUILT IN 1930 WITH HULL NUMBER 721, NAMED "FLASH II", Defendant.	Civil Action # 05-10192
KERRY SCOTT LANE, Claimant.	

POINTS AND AUTHORITIES IN SUPPORT OF CLAIMANT'S MOTION FOR RECONSIDERATION OF THE ORAL RULING ON SOVEREIGN IMMUNITY

The Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") waived sovereign immunity to allow successful forfeiture claimants to sue for money damages under the Federal Tort Claims Act for "any claim based on injury or loss of goods, merchandise or other property" while held by law enforcement agencies for the purpose of forfeiture. 28 U.S.C. § 2680(c). CAFRA's waiver of sovereign immunity was held to allow a successful forfeiture claimant to obtain a money judgment for the fair market value of the property (which coincidentally had been sold for a tenth of its value while litigation was pending). *Intrigue Trading, Inc., v. United States*, C.D. Cal. # CV-04-02360 Order Denying Defendant's Motion to Dismiss. See Exhibit __ .

Here, the Flash II was also sold for a tenth of its value while the forfeiture litigation was pending. As a prevailing claimant in the forfeiture litigation, Dr. Lane – like Intrigue Trading Inc. – is entitled to the full fair market value of his interest in Flash II.

The government nevertheless attempts to hide behind the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a). It argues that "the law *presumes* that a decision is grounded in policy (social, economic or political)"[1] and claims that unless Dr. Lane can show that the government conduct violated a mandatory regulation its conduct must be deemed discretionary. The government claimed Dr. Lane bears the burden of proof on this issue. Gov. Supp. Mem., Doc. 63-1 p. 9. This is a misstatement of the law.

I. The government has the burden of proving the discretionary function applies

The *government* has the burden of proving the discretionary function applies. MOORE'S FEDERAL PRACTICE, vol. _ § 105.26[7][e] (3rd Ed. 2006) (hereinafter cited as "MOORE'S") ("The party asserting an exception to FTCA liability has the burden of proving that the exception applies to the claims or case"). See also *Bear Medicine v. United States*, 241 F.3d 1208, 1213-1217 (9th Cir. 2001).

"The general rule that a waiver of sovereign immunity is construed strictly in favor of the sovereign does not apply in the context of the FTCA." MOORE'S vol. __ § 105.26[7][d], citing *Dolan v. United States Postal Serv.*, 546 U.S. 481, 491-492 (2006). *Dolan* explained:

> [T]his case does not implicate the general rule that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign," *Lane v. Pena*, 518 U.S. 187, 192, (1996). As *Kosak* [*v. United States*, 465 U.S. 848 (1984)] explains, this principle is "unhelpful" in the FTCA context, where "unduly generous interpretations of the exceptions run the risk of

[1] Doc. 63-1 p. 9 (emphasis in original).

> defeating the central purpose of the statute," 465 U.S., at 853, n. 9, which "waives the Government's immunity from suit in sweeping language," *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951); see also *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (observing "we have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the 'sweeping language' of the [FTCA]" (quoting *Yellow Cab Co.*, supra, at 547)). Hence, "the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception' -- no less and no more." *Kosak*, supra, at 853, n. 9 (quoting *Dalehite v. United States*, 346 U.S. 15, 31 (1953)).

546 U.S. at 491-492 (2006).

II. The mandatory duty rule

In *Berkovitz v. United States*, 486 U.S. 531, 536-39 (1988), the Supreme Court held that

> the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive.

486 U.S. at 536. This is called the mandatory duty rule.

By falsely claiming that Dr. Lane had the burden of proof and refusing to turn over the applicable policy manual – claiming it was "internal" – the government attempted to hide behind a secret policy no one else could see. The government had no right to hide behind this exception while refusing to disclose its internal regulations. See *Ignatiev v. United States*, 238 F.3d 464, 466-67 (D.C. Cir. 2001) (internal policies and guidelines may constitute basis for mandatory duty; party opposing discretionary function exception is entitled to limited discovery to determine existence of internal policies that show the government actions were non-discretionary.) Since the government has the burden of proof, it cannot rest behind its naked assertion that applicable statutes, regulations and policies gave it unfettered discretion to auction the Flash II through Guernsey's without a minimum reserve.

Now that the government's policy manual has been obtained through ordinary channels of the federal bureaucracy,[2] the purpose of the government's obfuscation is clear – the government is desperately trying to cover up the fact that it violated Department of Justice policy *and* federal statutes in auctioning Flash II as it did.

A Guide to Interlocutory Sales and Expedited Settlement (2003) (hereinafter cited as "*Guide*") [see Exhibit 1], states in its introduction to Part II:

> Forfeiture litigation may take years to complete, and situations may arise in which it is necessary or desirable to liquidate the property to preserve its value prior to a final order or judgment of forfeiture. Such sales, called "interlocutory" because they occur *during the pendency of litigation*, may be held pursuant to a court-approved stipulation of all parties. In the absence of an agreement, the court may order an interlocutory sale when certain criteria are met.

Id. at II-1 (emphasis added). "The primary consideration... is whether prompt sale is necessary to preserve the value of the property for forfeiture." *Guide* at II-2.

The *Guide* explains that – absent a stipulation between all the parties agreeing to the terms of the sale – the government has to obtain a court order finding one of three narrow grounds, after a hearing with notice to all interested parties. Federal statutes mandate that the property not be sold for less than 2/3 of its appraised value, after obtaining three appraisals.

A. Interlocutory sale by stipulation of all interested parties

"Interlocutory sales require court approval. This is most easily obtained when all interested parties agree to the sale." Id. at II-5.

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[2] It is clear that this manual was never too "internal" to be released. It is clearly the same type of manual as the DOJ *Asset Forfeiture Policy Manual,* which was released under the Freedom of Information Act. Dr. Lane did not have time to pursue a FOIA request before responding to the government's sovereign immunity argument.

> If all interested parties consent to the sale, the parties may simply enter into a stipulation agreeing to sell the property, setting forth the terms of the proposed interlocutory sale, the process by which the sale will be conducted, and the agreed disposition of the proceeds pending conclusion of the case. ... The stipulation should be signed by all interested parties known to the Government, including all claimants in a civil case, all lienholders of record, *and all other persons known to have or to assert an ownership interest in the property*.[3]

Id. at II-5 (emphasis added).

Here, there was no attempt to obtain Dr. Lane's consent or a stipulation. The government simply announced it was selling the sailboat at Guernsey's December 2005 sale of Kennedy memorabilia. Dr. Lane stated that he would consent to the auction – but only if a minimum reserve was set which was acceptable to him. Lane Motion to Stay Judgment Pending Appeal, filed 11-8-2005, Doc. 25 p. 1 and Doc. 25-1, p. 2 and n. 1. Dr. Lane explained his concern that an auction without minimum reserve would risk a sale below market value.

> Because auctions of forfeited property are considered distress sales they typically result in prices significantly below fair market value – in fact they are often advertised as such. Given the fact that Dr. Lane and other co-owners of the sailboat were not served with notice and given the opportunity to contest the forfeiture before default judgment was entered, the potential clouds on the title could deter potential bidders from offering full value.[4]

Doc. 25-1 p. 2 n. 1.

B. Interlocutory sale over an owner's objections

"Where all interested parties do not agree to the interlocutory sale, federal statutes and case law provide means of obtaining the court's approval for a contested sale, pursuant to

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[3] Thus, the fact that Dr. Lane had not been allowed to intervene in the case as a claimant prior to the sale, did not exempt the government from obtaining his consent to the terms of the sale.

[4] That, apparently is exactly what happened. Media publicity surrounding the auction included a prominent Boston Globe article about the forfeiture case and Dr. Lane's appeal of his unsuccessful attempt to intervene and vacate the default judgment.

complex and *strict guidelines*." *Guide*, Foreword at p. ii (emphasis added). "If the parties do not agree to an interlocutory sale of the property or to the sale terms, a court order authorizing the sale must be obtained by motion served on all interested parties..." *Guide* at II-6. Grounds for ordering an interlocutory sale over the objection of a party are limited to these situations:

> (A) "the... property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action;"
>
> (B) "the expense of keeping the property is excessive or disproportionate; or"
>
> (C) "there is an unreasonable delay in securing the release of the property."

Supp. R. Admir. Rule E(9)(b), quoted in *Guide* at II-3. The same standards are imposed by 19 U.S.C. § 1612(a), allowing interlocutory sale if the property "is liable to perish or to waste or to be greatly reduced in value by keeping, or ... the expense of keeping the same is disproportionate to the value thereof...."

"The court may order that such a sale take place over a party's objection." *Guide* at II-6. However, the order "must be obtained by motion served on all interested parties" and "the court must articulate the reasons justifying the interlocutory sale." Id. Those conditions were not met.

C. Procedure for conducting a contested interlocutory sale

> When a court orders an interlocutory sale over the objection of any interested party, such a sale must comply with the provisions of 28 U.S.C. §§ 2001, 2002, and/or 2004. These statutes provide procedural safeguards to ensure that court-ordered sales are made on terms that best preserve the parties' interests.
>
> Section 2001(a) authorizes public sales of real property and sales by court-appointed receivers. Section 2001(b) permits private sales of real property after a hearing with notice to all interested parties and after the court finds that the best interests of the estate will be conserved thereby.
>
> *Before confirming a private sale, the court must obtain three appraisals. No private sale can be confirmed for less than two-thirds of the appraised value*. The

> proposed sale terms must be published before confirmation. The sale cannot be confirmed if a bona fide offer is made to buy the property for at least ten percent more than the proposed sale price. 28 U.S.C. § 2001(b).
>
> ... Contested interlocutory sales of personal property must be conducted in the same manner as real property sales, "unless the court orders otherwise." 28 U.S.C. § 2004.

Guide at II-6 (emphasis added).

The government's argument that the *Guide to Interlocutory Sales* is inapplicable because the sale occurred after entry of the default judgment[5] misses the point. The standards enunciated in the manual come from federal statutes that do not limit their reach to sales prior to entry of a judgment. The word "interlocutory" is not mentioned.

Pursuant to 28 U.S.C. § 2001(a), "any realty or interest therein *sold under any order or decree of any court of the United States* shall be sold... at public sale at the courthouse of the county, parish or city in which the greater part of the property is located." Under 28 U.S.C. § 2004, the provisions of § 2001 apply to sales of personal property. (Emphasis added.)

Since the auction was held at a private facility in New York City – and not at the federal courthouse in Boston, where the property was located – the Guernsey's auction did not qualify as a public sale. The only other way to sell such property is through a private sale, pursuant to 28 U.S.C. § 2001(b). Section 2001(b) requires the government to first obtain three appraisals, and the property cannot be sold for less than 2/3 of the appraised value.

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[5] The government in refusing discovery of the *Guide* has attempted to hyper-technically define the term "interlocutory sales" as sales occurring before final judgment, relying on the use of the term "interlocutory" in the sense of an interlocutory appeal. Because appeals are limited by the final judgment rule, the term "interlocutory" in appellate procedure does not necessarily coincide with the meaning of the term in relation to the forced sale of subject property while litigation is ongoing. Indeed, the *Guide* uses the term quite broadly. "Such sales [are] called "interlocutory" because they occur *during the pendency of litigation....*" *Guide* at II-1.

The government apparently only obtained one appraisal, not the three mandated by statute. Arlan Ettinger's November 18, 2004 appraisal, commissioned by the DEA, valued Flash II at between $800,000 and $1,000,000. See Exhibit 2. Since a private sale must be for at least 2/3 of the appraised value, Flash II could not legally have been auctioned at Guernsey's without at least a $600,000 minimum reserve (using the mid-range average of the one appraisal). This is a mandatory duty under the federal statutes.[6] Instead, the government stubbornly and lawlessly auctioned the Flash II through Guernsey's with no minimum reserve, resulting in a completed sale of $100,000 – approximately a tenth of the sailboat's appraised value.

Having failed to comply with its mandatory duty, the government cannot hide behind the discretionary function exception, and CAFRA's waiver of sovereign immunity permits Dr. Lane to obtain a money judgment for the fair market value of his interest in the Flash II.

D. Having decided to ignore its mandatory duties, the government's lawless conduct included further gyrations to accomplish its illegal private sale

It is not necessary for Claimant to go beyond the arguments presented above to establish that the mandatory duty rule precludes the government's reliance on the discretionary function exception. However, the government's subsequent deviations from its own internal policy showed the depths of its duplicity. Through their violation of DOJ policies the agents destroyed any meaningful recourse Dr. Lane had to retrieve the sailboat from the purchaser at auction – leaving the FTCA as his only remedy.

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[6] In its *Guide*, the Department of Justice admits that the provisions of §§ 2001 and 2004 apply to forfeiture sales and that they are mandatory. "When a court orders an interlocutory sale over the objection of any interested party, such a sale must comply with the provisions of 28 U.S.C. §§ 2001, 2002 and/or 2004." *Guide* at II-6.

1. The Guernsey's contract

Guernsey's auction house owner Arlan Ettinger, who appraised Flash II for the DEA in November 2004, wanted to include Flash II in Guernsey's December 2005 auction of JFK memorabilia. Documents produced in connection with Ettinger's deposition show that Guernsey's and the U.S. government engaged in discussions on amendments to Guernsey's standard auction consignment contract, and that a number of revisions were made – mostly having to do with the sliding scale percentage Guernsey's would take from the sale price. See Exhibit 3, Ettinger deposition documents.

Despite the negotiated contract revisions, several mind-boggling provisions remained in the contract signed by Marshal Service employee Mary Magna, allowing Guernsey's to auction the Flash II without a minimum reserve. See Exhibit 4

First, the government falsely warranted that it owned title free and clear of all liens and claims:

> 10. Representations, Warranties and Indemnification. You represent and warrant that you have title to the Property and the right to consign the Property for sale by us and that the Property is and will until the completion of the sale by us be free and clear of all liens, claims, encumbrances of others of whatever nature and that good title and right of possession of the Property will pass to the buyer free of all such liens, claims, encumbrances of whatever nature, and that there are not and, until the completion of the sale by us, there will not be any restriction or claims against us prohibiting or restricting our right to offer the Property at auction...

Guernsey's contract, paragraph 10. Exhibit 4 p. 2..

The contract's warranties of clear title were backed up by a hold harmless agreement, in which the U.S. government agreed to indemnify Guernsey's and/or the buyer, including attorneys fees, if they had to undergo litigation over title to the property.

> You hereby agree to indemnify us and hold us harmless from and against any and all claims, damage, loss or expense, inclusive of attorneys' fees, which we may incur by reason of your breach or alleged breach of any of your obligations, warranties or representations herein.

Id. Amazingly, the government also warranted that the property was not forfeited!

> ...Consignor represents and warrants to Guernsey's that... (b) the Property is not "confiscated Property" within the meaning of any United States federal or state laws, (c) Consignor's consignment to and authorization of Guernsey's to sell the property is in full compliance with all United States federal and state laws...

2. The policies of the DOJ *Asset Forfeiture Policy Manual*

The DOJ manual that the government did begrudgingly turn over[7] – the 2005 *Asset Forfeiture Policy Manual*, discusses the procedures regarding transfer of title to forfeited property in Chapter 5 (attached as Exhibit 5.) The "Legal analysis" section begins with a caveat that the procedures specified govern disposition of property that has already been forfeited – that is, that the forfeiture process has progressed to the point that title has transferred to the government.

> Forfeiture divests an owner of property of all his or her right, title, and interest therein, and vests such right, title, and interest in the Government. In other words, because of the property's or its owner's involvement in criminal activity, forfeiture extinguishes all of the former owner's interests in that criminally derived or criminally involved asset and vests title in the United States." While the relation back doctrine found in section 853(c) provides that all right, title, and interest in forfeitable property vests in the United States upon the commission of the criminal act giving rise to the forfeiture, the Government's ownership interest therein is not confirmed to the world unless and until a final order of forfeiture is entered by a court.

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[7] The government turned it over only after the Court ordered it to, and delayed providing Claimant's counsel with a copy (citing difficulty finding another copy) until after the Court's May 15 oral ruling granting summary judgment for the government on sovereign immunity. See emails from Nancy Rue, Ex. 7.

> Since the forfeiture process vests title to the property in the United States, a forfeiture sale is a sale by the Government of property it owns.

Asset Forfeiture Policy Manual, Exhibit 5, p. 86.

At the time the Flash II was sold, the government could not reasonably believe it had title, free and clear of all claims. Dr. Lane had challenged the default judgment as void for lack of due process. His motion to vacate the default judgment had been denied for a reason not permitted under binding First Circuit precedent.[8] Though the government successfully hid the facts until discovery after remand, the government knew it had made no attempt to locate Dr. Lane or any other of the co-owners. Dr. Lane had already filed an appeal, though it had not yet been docketed in the court of appeals, when the government auctioned the sailboat. On remand from the appeal the default judgment was shown to be void for lack of due process notice.

Part IV of the *Policy Manual*, "Attorney General's Authority to Warrant Title" governs the procedures regarding the transfer of title of forfeited property. Subsection B states

> Following the completion of procedures for the forfeiture of property pursuant to any law enforced or administered by the Department, the Attorney General is authorized, in her discretion, to warrant clear title to any subsequent purchaser or transferee of such property.
>
> The preferred deed to transfer forfeited property is a U.S. Marshal's quitclaim deed (USM-159A) executed by the U.S. Marshal. The quitclaim deed makes no warranty representations. It serves only to convey whatever right, title, and interest the Government had as of the execution date. A special warranty deed may be used instead when the U.S. Marshal, in consultation with the U.S. Attorney, concludes that such a deed is necessary and appropriate under the facts of a particular case, as described in section IV.B below. Finally, property may be transferred by a general warranty deed, but it is DOJ policy to use general warranty deeds only in exceptional circumstances as outlined in section IV.C at page 90.

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[8] See *Gonzales-Gonzales v. United States*, 257 F.3d 31, 38 (1st Cir. 2001), cited in *United States v. One Star Class Sloop Sailboat... Named "Flash II"*, 458 F.3d 16, 22-23 (1st Cir. 2006).

In footnotes the *Policy Manual* explains:

> The special warranty deed assures the grantee/buyer that the United States, as the current seller, has done nothing to encumber the property, nor has it conveyed any right, title, or interest in the property while the Government was the owner of the property. In effect, the special warranty deed warrants the forfeiture process.

P. 87 n. 93. A special warranty may be used when the government concludes it is necessary and appropriate under the facts of a particular case, under the "limited circumstances" provided in Section IV-B at p. 99.

Of the seven "limited circumstances" or "special circumstances" enumerated, three include situations where the government is unsure it provided constitutionally adequate notice - in scenarios suggesting the party possibly deprived of notice was not actively contesting the case. (Items 1, 4, 5). Clearly, Dr. Lane falls into a different category[9] than any of those three examples of potential clouds on title due to inadequate service of process. Item 6 makes it a special circumstance if the forfeiture judgment is appealed at all – even when the claimants were given their full due process rights. The prevalence of so many special circumstances, and the seriousness of the due process issues presented here should have alerted the government that an interlocutory sale over Dr. Lane's objection was not appropriate under DOJ policy.

Because of the obvious cloud on its default judgment, the government went out of its way to warrant title to Guernsey's.

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[9] Dr. Lane came forward and identified himself to the U.S. Attorney's Office before the default judgment was entered. He filed a motion to vacate the default judgment alleging the judgment was void for lack of due process notice, and was actively litigating it when the property was sold without his consent.

The highest form of warranty discussed in the *Policy Manual* is the general warranty – which is to be used “only in exceptional circumstances outlined in Section IV.C. at page 90." A general warranty “assures the grantee/buyer that title to the property is free and clear of any and all liens and encumbrances and insures the grantee/buyer from any future claims against the property.” Id. p. 88 n. 94. The government provided Guernsey’s with a general warranty:

> You represent and warrant that you have title to the Property and the right to consign the Property for sale by us and that the Property is and will until the completion of the sale by us be free and clear of all liens, claims, encumbrances of others of whatever nature and that good title and right of possession of the Property will pass to the buyer free of all such liens, claims, encumbrances of whatever nature, and that there are not and, until the completion of the sale by us, there will not be any restriction or claims against us prohibiting or restricting our right to offer the Property at auction...

Guernsey’s contract, Exhibit 4, paragraph 10. According to the *Policy Manual*:

> It is the policy of the DOJ that the Attorney General's discretion to warrant clear title, through the use of a general warranty deed, will be exercised only in compelling circumstances where the financial advantage of offering a general warranty deed in the particular case, compared to the available alternatives, far outweighs both the potential cost of honoring the warranty in that case and the potential effect of increased purchaser demand for general warranty deeds in future sales of other forfeited properties....
>
> ... If one or more of the circumstances listed in section IV.B at page 88, is present, and the U.S. Marshal and the U.S. Attorney responsible for the forfeiture action deem it appropriate to warrant clear title, the U.S. Marshal and the U.S. Attorney shall request approval from the Seized Assets Division to convey title through a general warranty deed or its equivalent.

Id. p. 90.[10]

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[10] On June 6, 2007, Claimant requested discovery of any documents submitted to the Seized Assets Division to obtain permission to provide Guernsey’s with a general warranty, pursuant to *Policy Manual* pages 89-90. AUSA Rue refused, stating the provision was irrelevant because it only applied to real property. Exhibit 7 pp. 5-6.

In addition to giving Guernsey's a general warranty, the government gave Guernsey's and the buyer at auction an indemnity and hold harmless agreement, including reimbursement of attorneys fees if litigation resulted over breach of the warranties of good title. Again the Justice Department violated its own policies.

The *Policy Manual* requires indemnification agreements to state:

> (2) In the event that a court in a final judgment rules that the United States did not acquire valid legal title to the real property through the forfeiture process and therefore was not able to convey clear title to the buyer, the United States will refund to the buyer the amount of the purchase price of the property, plus the value of any improvements made to the property by the buyer. The amount will be paid out of the Assets Forfeiture Fund, plus interest on the total amount at the current rate as provided in 28 U.S.c. § 1961 from the date of the purchase of the property by the buyer to the date of the final judgment.

Policy Manual Exhibit 5 p. 89. The Guernsey's contract failed to include such a provision. Instead, it broadly agreed to indemnify Guernsey's and the buyer and hold them harmless for any claims, including attorney's fees.

If the indemnification agreement had included the required clause, the auction sale could have been voided and the sailboat returned to Dr. Lane to be resold at fair market value. Instead, the Guernsey's contract armed Guernsey's and the buyer with the full financial backing of the U.S. government – including attorneys fees – to defend its bogus title against Dr. Lane.

Given the rampant disregard of its mandatory duties, the government cannot rely on the discretionary function exception, and sovereign immunity does not protect it. Therefore, Dr. Lane is entitled to the full fair market value of his property interest in Flash II.

Respectfully submitted,
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