

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

-----X)	
UNITED STATES OF AMERICA,)	<u>COMPLAINT</u>
)	
Plaintiff,)	Civil Action No.
)	
v.)	
)	
PERRY PHILLIPS and)	
BENJAMIN C. FOSTER,)	
)	
Defendants.)	
-----X		

Plaintiff, the UNITED STATES OF AMERICA, by its attorney RICHARD B. MYRUS, Acting United States Attorney for the District of Rhode Island, and Zachary A. Cunha, Assistant United States Attorney, of counsel, for its complaint in the above-entitled action, alleges as follows:

PRELIMINARY STATEMENT

1. This is a civil action seeking to recover costs, expenses, and penalties pursuant to 14 U.S.C. §§ 521(c)(2),(3); and/or costs and expenses pursuant to 18 U.S.C. § 1038(b), by virtue of a violation of 18 U.S.C. § 2820(a)(1)(F). Specifically, this action seeks to recover penalties and costs expended by, *inter alia*, the United States Coast Guard to conduct and carry out an unnecessary marine search and rescue operation as a result of Defendants' knowing and willful discharge of marine distress signal flares in the absence of an actual emergency.

JURISDICTION AND VENUE

2. This action arises under 14 U.S.C. § 521 and 18 U.S.C. § 1038(b). This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1345.

3. Venue is proper in the District of Rhode Island pursuant to 31 U.S.C. 3732(a), 28 U.S.C. § 1391(b) and 28 U.S.C. § 1395(a), because, *inter alia*, Defendants reside in and/or a substantial portion of the events giving rise to this Complaint occurred in this District.

PARTIES

4. Plaintiff, the United States of America, is a sovereign and body politic.

5. The United States Coast Guard (the “Coast Guard” or “USCG”) is a branch of the United States Armed Forces, operating in peacetime under the authority of the United States Department of Homeland Security, pursuant to 6 U.S.C. § 101. The Coast Guard does, and is authorized by statute to, *inter alia*, perform any and all acts necessary to rescue and aid persons and protect and save property. 14 U.S.C. § 521.

6. At all times relevant to this Complaint, the Coast Guard operated USCG Station Point Judith, located within the State of Rhode Island, and USCG Air Station Cape Cod, located within the Commonwealth of Massachusetts.

7. Defendant PERRY PHILLIPS (“PHILLIPS”) is, and at all times relevant to this complaint, was, a resident and domiciliary of the State of Rhode Island.

8. Defendant BENJAMIN C. FOSTER (“FOSTER”) is, and at all times relevant to this complaint, was, a resident and domiciliary of the State of Rhode Island.

9. Throughout the remainder of this Complaint, unless identified individually, PHILLIPS and FOSTER, are collectively referred to as “Defendants.”

APPLICABLE LAW

10. Title 14, United States Code, Section 521, provides, *inter alia*, that any individual who knowingly and willfully communicates a false distress message to the Coast Guard or causes the Coast Guard to attempt to save lives and property when no help is needed is subject to a civil penalty of not more than \$10,000; and liable for all costs the Coast Guard incurs as a result of the individual's action. 14 U.S.C. §§ 521(c)(2), (3).

11. Title 18, United States Code, Section 1038 provides that any person who engages in any conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed, and where such information indicates that an activity has taken, is taking, or will take place that would constitute a violation of, *inter alia*, chapter 111 of Title 18, is liable in a civil action to any party incurring expenses incident to any emergency or investigative response to that conduct, for those expenses, jointly and severally with any other person ordered to make reimbursement for such expenses. 18 U.S.C. §§ 1038(b), (c)(2).

12. Title 18, United States Code, Section 2280(a)(1)(F), a section of Chapter 111 of Title 18 of the United States Code, makes it unlawful to communicate information, knowing the information to be false and under circumstances in which such information may reasonably be believed, that endangers the safe navigation of a ship. 18 U.S.C. § 2280(a)(1)(F).

FACTUAL ALLEGATIONS

A. DEFENDANTS' VOYAGE AND DISCHARGE OF DISTRESS FLARES

13. On or about June 6, 2020, which date being approximate and inclusive, Defendants borrowed a flare gun and flares from a friend.

14. After procuring the flare gun and flares, Defendants launched a skiff from Payne's Dock, located at 133 Ocean Avenue, New Shoreham, Rhode Island, and proceeded by sea to the vicinity

of a beach north of Breezy Point on the western side of Block Island, with the intent to discharge flares from the skiff at a location and in a manner such that the flares would be visible to individuals attending a wedding reception in that area.

15. Upon the skiff's arrival in the vicinity of Breezy Point, at or about approximately 21:30 hours, while still at sea, Defendants proceeded to knowingly, purposefully, and/or intentionally discharge approximately three flares into the air using the flare gun, in a manner that caused the flares to be visible at a distance.

16. At least one of the Defendants recorded the lighting and discharge of one or more of the flares on video, true and accurate excerpts from which are depicted below at Figures A-D:

FIGURE A



FIGURE B

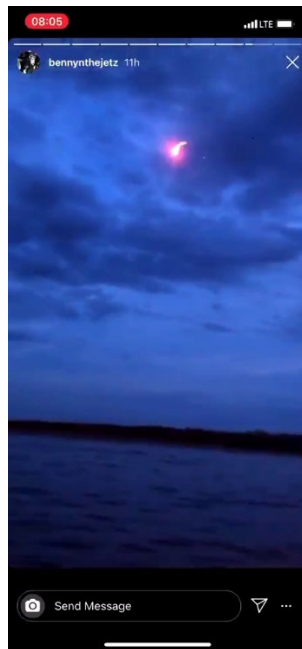


FIGURE C

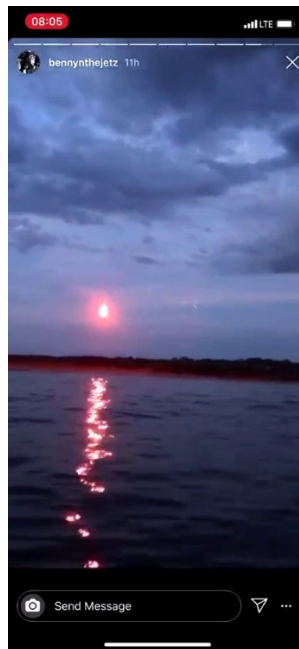


FIGURE D



17. As a matter of commonly accepted maritime custom and practice, the discharge of flares of the color and type used by Defendants, and in the manner discharged by Defendants, are understood to convey that a vessel or its crew is in distress or in need of assistance.

18. At the time of their use and discharge, at least one of the Defendants, by virtue of prior training and experience, knew that the flares were a sign or signal of maritime distress and should not be used absent such distress.

19. Both Defendants knew that the flares should not have been used under the circumstances and for the purpose for which they were employed by Defendants on June 6, 2020.

20. After discharging the flares, Defendants returned the skiff to shore.

B. THE AFTERMATH AND RESCUE RESPONSE

21. Upon observing the flares that had been discharged by Defendants, one or more citizens contacted the Town of New Shoreham harbormaster to report observation of the flares.

22. As a direct and proximate result of the discharge of the flares and their observation by witnesses, the New Shoreham Harbormaster and an officer of the New Shoreham Police Department undertook a 1.5 hour search of the waters and shoreline in the area where the flares were sighted.

21. As a direct and proximate result of the use of the flares and their observation by witnesses, the Coast Guard deployed a surface vessel and two helicopters from USCG Station Point Judith, and USCG Air Station Cape Cod to conduct a surface and air search of the waters and shoreline in the area where the flares were sighted.

22. New Shoreham personnel also incurred equipment and personnel costs to carry out the search activities they undertook as a result of the events described herein.

23. The total cost of the search activities undertaken by Coast Guard personnel was \$103,948.00, inclusive of equipment operation and personnel costs.

24. The Coast Guard's costs included the equipment and personnel expenses for two aircraft that were in operation for 2.97 and 1.73 hours, respectively; as well as one surface vessel that was

underway for 3.97 hours, as well as the coordinating activities of the Coast Guard's Southeastern New England Command Center.

COUNT I
(14 U.S.C. § 521(c)(2), (3))

25. The United States repeats and incorporates by reference the allegations contained in paragraphs 1 through 24 as if fully set forth herein.

26. By their actions as alleged in this Complaint, Defendants knowingly and willfully communicated a false distress message to the Coast Guard.

27. In the alternative, by their actions as alleged in this Complaint, Defendants caused the Coast Guard to attempt to save lives and property when no help was needed.

28. By virtue of Defendants actions as alleged above, each Defendant committed a violation of 14 U.S.C. §§ 521(c)(2), (3) and the United States is thereby entitled to recover a civil penalty against them of not more than \$10,000; together with all costs the Coast Guard incurred as a result of Defendants actions, which costs total \$103,948.00.

COUNT II
(18 U.S.C. §§ 1038(b), (c)(2))

29. The United States repeats and incorporates by reference the allegations contained in paragraphs 1 through 24 as if fully set forth herein.

30. By their actions as alleged in this Complaint, Defendants communicated information by means of the use and discharge of nautical distress flares, namely information that a vessel or person was in distress and in need of assistance.

31. At the time they did so, Defendants knew that the information communicated by means of discharging the flares, namely the existence of a maritime distress situation, was false.

32. Defendants discharged the flares in a manner and under circumstances in which the information conveyed by the flares, namely the existence of a maritime distress situation, could reasonably be believed.

33. In so doing, Defendants endangered the safe navigation of a ship.

34. In so doing, Defendants conveyed false or misleading information indicating that an activity had taken, was taking, or would take place that would constitute a violation of, *inter alia*, chapter 111 of Title 18.

35. As a direct and proximate result of Defendants actions, New Shoreham and Coast Guard personnel incurred expenses incident to any emergency or investigative response to Defendants' conduct.

36. By virtue of Defendants actions as alleged above, Defendants committed a violation of 18 U.S.C. §§ 1038(b), (c)(2) and thereby are liable to the United States and the Town of New Shoreham for all expenses incurred incident to their emergency or investigative response.

PRAYER FOR RELIEF

Wherefore, Plaintiff, the United States of America, requests that judgment be entered in its favor and against Defendants, as follows:

1. On Count I:
 - a. in the amount of \$10,000 as to Defendants PHILIPS and FOSTER, representing the civil penalty prescribed by law;
 - b. and in the amount of \$103,948.00, jointly and severally as to both Defendants.
2. In the alternative, on Count II, in the amount of \$103,948.00, jointly and severally as to both Defendants, which represents the costs incurred by the Coast Guard, and the costs incurred by the Town of New Shoreham, in an amount to be determined at trial;

3. With interest thereon at the rate prescribed by statute running from the date of judgment;

Together with such other and further relief as the Court deems just and proper.

Dated: Providence, Rhode Island
October 4, 2021

Respectfully submitted,

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BY: /s/ Zachary A. Cunha
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