

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: A10005-0004
Claimant	: O'Briens Response Management OOPS
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$242,366.26

INCIDENT

On October 30, 2009 the M/V DUBAI STAR (the vessel) and a fuel barge were conducting bunkering operations in San Francisco Bay when it discharged between 400 and 800 gallons of oil into the water. The vessel was designated as the source of the discharge. Pioneer Ship Management Services L.L.C. (Pioneer) was the Owner/Manager of the vessel; South Harmony Shipping, Inc. (South Harmony) was the operator. Both are responsible parties under OPA. South Harmony accepted responsibility for the removal actions associated with the incident.

CLAIMANT and the CLAIM

Pioneer executed a Contract for Oil Spill Response Services for Tank Vessels with O'Brien's Response Management Inc. (O'Brien's or the Claimant) on or about October 30, 2009, the day of the incident. O'Brien's asserted that it conducted removal activities from October 30, 2009 through March 2010 and submitted eleven invoices¹ to South Harmony totaling \$784,662.23. Of that amount Pioneer paid \$542,295.97, leaving a balance of \$242,366.26. O'Brien's presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) on May 26, 2011, seeking reimbursement of the remaining \$242,366.26.

Upon receipt of the claim the National Pollution Funds Center (NPFC), which administers the Fund, notified Greg Poulos, Cox, Wooten, Griffin, Hansen & Poulos, attorney for the responsible parties, that O'Brien's presented a claim to the NPFC for \$242,466.26.² [REDACTED] responded on July 15, 2011, asserting that the Claimant had contractually agreed to submit any dispute involving its services to mediation and binding arbitration before AAA arbitrators in Louisiana.³ In that letter [REDACTED] invoked its right to mediation and binding arbitration under the terms of the contract, demanding that O'Brien's withdraw their claim from the Fund and submit to mediation and arbitration.⁴

In a letter dated September 1, 2011, an attorney for O'Brien's argued that Claimant met all requirements for submitting a claim to the Fund.⁵ It first presented its claim to the responsible party. Some invoices for uncompensated removal costs were not settled by payment within 90 days; therefore it brought its claim to the Fund. O'Brien's argues that it has a statutory right to adjudication and payment of its claim and that right cannot be eliminated by the call for alternate dispute resolution or arbitration.

FACTS

O'Brien's Response Management Inc. Contract

The Contract for Oil Spill Response Services for Tank Vessels (the Contract) is a standard form O'Brien's executes with owners and operators of tank vessels anywhere in the world to provide Qualified Individual (QI) services and response actions for oil spills. The Contract includes several schedules,

¹ The eleven invoices were provided to South Harmony at various times from November 30, 2009 through July 31, 2010.

² See NPFC letter dated June 6, 2011.

³ [REDACTED] letter to the NPFC dated July 15, 2011.

⁴ Id.

⁵ [REDACTED], Legal Advisor, letter to the NPFC dated September 1, 2011.

including one that lists covered vessels⁶ (Schedule A), provides pre-spill services to a vessel owner (Schedule B), provides rates for personnel and services, equipment and reimbursable expenses (Schedule C), and lists applicable geographic areas and local requirements (Schedule D).

Schedule D includes provisions and protocols for settling differences between the parties.

Article 13: Applicable Law

This Agreement shall be governed in all respects by the general maritime law of the United States and applicable federal statutory law. To the extent there is no applicable or governing general maritime or federal law, principle, statute or jurisprudence, this Agreement shall be governed by the laws of the State of Louisiana.

Article 14: Arbitration

If any dispute or disagreement should arise between the parties, the parties agree to pursue non-binding alternate dispute resolution with a single mediator in New Orleans, Louisiana, for a period of ninety (90) days following the commencement of the dispute. Thereafter, in the event the parties have not resolved their differences, any remaining controversy or claim arising out of or relating to this Agreement, or performance or breach thereof, shall be resolved by binding arbitration in accordance before a single arbitrator in New Orleans, Louisiana, subject to the rules and procedures of the American Arbitration Association. Judgment rendered by the Arbitrator may be entered and enforced in the United States District Court for the Eastern District of Louisiana.

Contract between O'Brien's and Pioneer

Claimant and Pioneer executed the O'Brien's standard contract on or about October 30, 2009, the date of the incident. The terms of the Contract provided that Claimant would provide response resources and services for the incident using O'Brien's Price List effective February 18, 2009.⁷ The Contract included the standard Schedules A, B, C, and D outlined above, including its published rate schedule.

The body of the Contract contained Article 13, Entirety of Contract and Governing Law, on the signature page of the contract. It provided that

[T]his Agreement and the attached schedules set forth the entire Agreement and understanding of the parties, supersedes and merges all prior discussions and writings between them and is not subject to modification or interpretation by any agent of the parties other than by written amendment hereto duly executed by the parties in accordance herewith.

Dispute between the parties

Claimant submitted its invoices and supporting documentation to South Harmony. The supporting documentation listed labor and materials/equipment provided by the Claimant for each day of the response. Mr. ██████ acknowledged Claimant's services and hired MR & Associates to perform an audit of the invoices. While Claimant asserts that it is owed \$242,366.26 in uncompensated removal costs, MR & Associates asserts that the balance due is \$44,202.74.

⁶ O'Brien's covers the DUBAI STAR for oil spill removal services in California, Panama, Panama AP, along with a vessel response plan (VRP).

⁷ See Article 5 and Schedule C of the Contract for Oil Spill Response Services dated October 30, 2009.

⁸ See MR & Associates audit of O'Brien's invoices provided by the Claimant.

The Parties' Arguments

The NPFC issued a letter to O'Brien's counsel, ██████████, Blank Rome, on December 21, 2011, requesting that it submit in writing its legal arguments for the NPFC authority to adjudicate the claim notwithstanding the arbitration clause in the contract. The NPFC issued a letter to Pioneer through Mr. ██████████ on December 21, 2011, requesting that it submit in writing its legal arguments for enforcing the arbitration clause in the contract and why the provisions in OPA supersede the provisions in the Federal Arbitration Act (FAA). The parties submitted their arguments to the NPFC.

APPLICABLE LAW

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90.

“Removal costs” mean “the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident.” 33 USC § 2701(31).

With certain exceptions all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714(a) of this title. 33 USC §2713(a)

If a claim is presented in accordance with subsection (a) of this section and the claim is not settled by payment within 90 days after the date upon which (A) the claim was presented or (B) advertising was begun pursuant to section 2714(b) of this title, whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present a claim to the Fund. 33 USC § 2713(c)(2).

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages.

Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party. 33 USC § 2712 (f).

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, a claimant must establish -

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.

NPFC ANALYSIS

When presenting a claim to the Fund for reimbursement of removal costs and damages, a Claimant's rights must include all rights, including the right to file an action in court.

The NPFC will address the applicability of the FAA below but the initial issue to be determined is whether the Claimant has retained all its rights in light of the binding arbitration clause in the contract. If Claimant has not retained all its rights, the NPFC cannot adjudicate and pay the claim because payment of the claim is subject to the United States Government acquiring by subrogation all rights of the claimant to recover from the responsible party.⁹ Further, if the Fund pays compensation under OPA to any claimant it shall be subrogated to all rights, claims, and causes of actions that the claimant has under any other law.¹⁰ Rich Franklin Corp. v. U.S. Department of Homeland Security, 2008 WL 337978 (D.Or.) (The plain language of Section 2712(f) uses the words “all rights” when describing what subrogation rights will be acquired by the government when a claimant is compensated by the Fund ... The statute clearly provides that a claimant must be able to supply the government with all of its subrogation rights against a responsible party. If the Fund pays a claim the government must have the ability to seek recourse against the responsible party.)

Both the responsible party and the Claimant acknowledge differences between the parties. Under the terms of the Contract, differences between the parties shall be resolved by alternate dispute resolution or ultimately by binding arbitration. Any decision rendered by the arbitrator may be entered into, and enforced by, the District Court for the Eastern District of Louisiana. It appears that under the terms of the Contract O’Brien’s has released its rights because any decision by the arbitrator could be enforced by District Court for the Eastern District Court of Louisiana. Thus, it appears that under the terms of the Contract, O’Brien’s cannot sue Pioneer in court, including a suit for liability under OPA because the issues would be resolved and enforced through the District Court of the Eastern District of Louisiana. If O’Brien’s has no rights it can take to court, it appears that it has no rights it can subrogate to the United States in order that the United States could take an action to court against Pioneer. At best it is unclear that O’Brien’s has any subrogable rights under the terms of the Contract to file an action in court under OPA. Therefore, it has not established that it has met the requirements of 33 U.S.C. § 2712(f).

The Federal Arbitration Act is applicable to the Contract between O’Brien’s and Pioneer.

Article 13 of the Contract provides that the Agreement shall be governed by the laws of the State of Louisiana if no applicable or governing general maritime or federal law, principle statute or jurisprudence applies. Claimant argues that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the FAA) is not applicable but that the Oil Pollution Act is applicable to, and the Contract should be governed by, that Act.

For the reasons discussed below, the FAA applies for two reasons. First, Section 2 of the FAA provides that arbitration clauses are valid, irrevocable and enforceable, save upon any grounds as exist at law or in equity for the revocation of any contract. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that would provide grounds for revocation of any contract, the Arbitration Act provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.) In this case O’Brien’s has not provided grounds in law or equity for revocation of the Contract or the arbitration clause. There is no evidence in the administrative record that the Contract was executed under fraud, duress or an unbalance of power. In fact the Claimant presented the Contract, its own standard form contract, to Pioneer for execution.

Second, Claimant has the burden to establish that Congress intended to preclude a waiver of judicial remedies in OPA and that arbitration clauses are not enforceable under that Act. The Supreme Court in several instances has determined that issues related to statutory rights in a federal law may be resolved by arbitration unless Congress clearly waives its intent to preclude a waiver of judicial remedies and that arbitration clauses are not enforceable. Shearson/American Express, Inc. v. McMahon, 482 U.S. at 227 (The burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.) See also Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20, 26 (1991) (It is a burden on the person arguing against arbitration to show that Congress intended to preclude a waiver of judicial remedies for Age Discrimination in Employment Act (ADEA) statutory remedies at issue. If such an intention exists it will be discoverable in the text of the ADEA, its legislative history or an inherent conflict between arbitration and the ADEA’s underlying purposes.) See also

⁹ 33 U.S.C. § 2712(f).

¹⁰ 33 U.S.C. § 2715(a).

Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 91-92 (2000).

Claimant argues that the provisions of OPA 90 govern this claim, rather than the FAA because its claim to the responsible party was not settled by payment within 90 days; therefore, it may initiate an action in court or bring its claim to the Fund for reimbursement. Claimant has not established that OPA precludes arbitration, has not identified any Congressional intent to do so, or noted a conflict between the FAA and the purposes of OPA, either through its explicit provisions or its legislative history. Claimant only argues that the arbitration clause in the Contract is not applicable because it has a statutory right to reimbursement from the Fund if the claim is not paid within 90 days.¹¹

The Supreme Court has consistently held that statutory rights may be adjudicated by arbitration. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (The FAA imposes a duty to enforce arbitration agreements that is not diminished when a party bound by an agreement raises a claim founded on statutory rights under the Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act.); Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. at 90. (Even claims under a statute designed to further important social policies, such as the Truth in Lending Act and Equal Credit Opportunity Act, may be arbitrated because as long as the prospective litigant effectively may vindicate his statutory cause of action in the arbitral forum the statute serves its function.); Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (A claim under the Sherman Act is subject to a contractual binding arbitration agreement.)

In this case OPA provides a statutory right for claimants incurring removal costs and/or damages resulting from an incident if the claim is not settled by payment within 90 days. Like a judge in a court action, an arbitrator could effectively and efficiently resolve the differences between the parties and determine how much of the remaining \$242,366.26 in removal costs should be paid to the Claimant.

Claimant also argues that the FAA is not applicable in this claim because the Contract is between Pioneer and O'Brien's and it cannot be enforced by a third party, such as the NPFC. It is not clear to the NPFC how this helps Claimant's argument against the applicability of the FAA because the United States would get Claimant's rights under 33 U.S.C. § 2712(f).

Even if the FAA is not applicable the Contract between O'Brien's and Pioneer is enforceable under Louisiana law.

Article 13 of the Contract provides that if no applicable maritime or governing general maritime or federal law applies, the Agreement shall be governed by the State of Louisiana. Louisiana law provides that when the words of a contract are clear and explicit and lead to no absurd consequences no further interpretation may be made in search of the parties' intent.¹² The terms of the Agreement between the parties are clear: if any dispute or disagreement arises between the parties the parties agree to pursue non-binding alternate dispute resolution and thereafter to have remaining disputes resolved by binding arbitration.

Louisiana law also provides that in case of doubt a provision in a contract must be interpreted against the person that furnished its text. It further provides that if a contract is a standard form of one party it must be interpreted in case of doubt, in favor of the other party.¹³ In this case the Contract is a standard form used by O'Brien's; it presented the contract to Pioneer for execution. Thus, any doubts or ambiguities must be interpreted against them. There are no written amendments to the Contract that modify or invalidate the arbitration clause. Claimant argues that Article 14 in the Contract does not apply but provides no basis for that argument. Since the Contract is an O'Brien's standard form and was presented to Pioneer, under Louisiana law, its interpretation is in favor of Pioneer and the dispute resolution and arbitration clause in Article 14. The arbitration clause should be upheld under Louisiana law.

¹¹ OPA provides that a claimant whose claim is not settled by payment within 90 days may bring a claim to the Fund or file an action in court. 33 USC S 2713(c), but as noted above a Claimant must have all rights and the United States must obtain all rights in order to pay the claim, and Claimant has not established that it has all rights it can subrogate in this claim.

¹² La. Civ. Code Ann. art 2045.

¹³ La. Civ. Code Ann. art. 2056.

CONCLUSION

This claim is denied on the grounds that Claimant has not established that it has the necessary subrogable rights to file an OPA liability action in court against the responsible party because it gave up that right under the terms of the contract. At the very least Claimant has failed to establish that it has that right under the terms of its contract with Pioneer. Additionally, Claimant, who is opposed to arbitration, has not met its burden to establish that the arbitration clause in the Contract is not valid, revocable or unenforceable nor has it established that Congress intended to preclude a waiver of the judicial remedies for OPA statutory rights.

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *5/2/12*

Supervisor Action: *Denial approved*

Supervisor's Comments: