CLAIM SUMMARY / DETERMINATION FORM

Date	: 2/03/2012
Claim Number	: N08057-0096
Claimant	: Golden Ocean Group Ltd
Type of Claimant	: Corporate
Type of Claim	: [redacted] Earning Capacity
Claim Manager	: [redacted]
Amount Requested	: $109,818.75

I. Facts

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision and discharged oil into the Mississippi River, a navigable waterway of the United States. Approximately 282,828 gallons oil[1] were released into the Mississippi River and the resulting spill response, coordinated by the FOSC Unified Command, initially closed the river to vessel traffic and later, when reopened, managed traffic.

II. Responsible Party

American Commercial Lines LLC (ACL), the Responsible Party (RP), owned the barge at the time of the incident and is a responsible party under the Oil Pollution Act.

III. The Claimant and the Claim

On May 3, 2011, Nordisk Legal Services (Nordisk) presented a claim to the National Pollution Funds Center (NPFC) for its client, Golden Ocean Group Ltd (GOGL). At the time of the collision and discharge of oil, the M/V Golden Joy was detained at Davant terminal (Mississippi River Mile Marker (MM) 54), where the vessel had completed loading.

Pursuant to the governing pool Time Charter Party,[2] GOGL was to place the vessel off-hire for the amount of delay suffered (from the time the vessel was supposed to depart until the river was once again open for sailing). The earnings distributed to each owner are reflected in a pool hire statement. Such statement is prepared on a monthly basis taking into account running adjustments of earnings and costs. The effect of placing the M/V Golden Joy off-hire was that the delay time at Davant was borne by GOGL, as it lost the ability to use the vessel in its pool. As a result of this, the allocation of off-hire for the M/V Golden Joy for the period of delay at Davant was reflected in GOGL's monthly pool hire statements, and a corresponding amount was deducted from the hire that would otherwise have been payable to it. (Due to running adjustments of the actual monthly hire payable, it was only upon the issuance of the pool hire statement six months after the relevant month that the results were fixed.) In the case of the M/V Golden Joy, the monthly rate of hire payable in July 2008 ended up at $77,978.00 pro rata per day, as reflected in the pool hire statement issued for the period January 16, 2009 through January 31, 2009. Based on this, Baumarine AS deducted the following amounts from the pool hire payable to GOGL:

Claimed Off-hire period: July 25, 2008 1800 hours – July 27, 2008 0348 hours = 1.40833 days
Pool hire rate: $77,978.00 Per Day
Total Amount deducted: 1.40833 days multiplied by $77,978.00 = **$109,818.75**

[1] See House Subcommittee Hearing on DM 932 Oil Spill, dated 9/15/2008.

[2] See Pool Participation Agreement between Baumarine AS and Golden Ocean Group Ltd, dated 8/31/2006, submitted with the claim by Nordisk for GOGL on 6/24/2011.

IV. APPLICABLE LAW

The responsible party for a vessel or facility from which oil is discharged, or poses a substantial threat of a discharge of oil into or upon the navigable waters is liable for the removal costs and damages resulting from such incident. 33 U.S.C. § 2702(a).

Damages include damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property or natural resources, which shall be recoverable by any claimant. 33 U.S.C. § 2702(b)(2)(E).

In general, claims for the removal costs or damages must first be presented to the RP. 33 U.S.C. § 2713(a). If the claim is not settled by payment by any person within ninety days, the claimant may commence an action in court against the RP or present the claim to the Fund. 33 U.S.C. § 2713(c).

The Fund shall be available to the President for the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to consistent with the National Contingency Plan or uncompensated damages. 33 U.S.C. § 2713.

Damage claims must be presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care. 33 U.S.C. § 2712 (h)(2).

Congress directed the President to promulgate regulations "for the presentation, filing, processing, settlement, and adjudication of claims..." 33 U.S.C. § 2713 (e). Those regulations are found at 33 CFR Part 136.

Under 33 CFR 136.105(a-b) & 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. Further, a claim presented to the Fund should include, as applicable:

> "a description of the actions taken by the claimant, or other person on the claimant's behalf, to avoid or minimize removal costs or damages claimed." 33 CFR 136.105(e)(7);
> "the reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney's fees or other administrative costs associated with the preparation of the claim." 33 CFR 136.105(e)(8).

A claimant must include an accounting, including the source and value, of all other compensation received, applied for, or potentially available as a consequence of the incident out of which the claim arises including, but not limited to, monetary payments, goods or services, or other benefits. 33 CFR 136.113.

With regard to claims for loss profits and impairment of earning capacity, the NPFC must independently determine that the proof criteria in OPA and the implementing regulations, at 33 CFR part 136 are met, including the general provisions of 33 CFR 136.105, and the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 CFR 136.231, *et seq.*

Pursuant to the provisions of 33 CFR 136.231, claims for the loss of profits or impairment of earning capacity due to injury to, destruction or, or loss or real or personal property or natural resources may be presented to the Fund by the claimant sustaining the loss or impairment.

"In addition to the requirements of subparts A & B or this part, a claimant must establish the following-

(a) That real or personal property or natural resources have been injured, destroyed, or lost.
(b) That the claimant's income was reduced as a consequence or injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
(c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparable figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
(d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant receives as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established." 33 CFR 136.233(a-d).

If a third party claimant or RP is able to establish an entitlement to lost profits, then compensation may be provided from the OSLTF, but the compensable amount is limited to the actual net reduction or loss of earnings and profits suffered. Calculations for the net reductions or losses must clearly reflect adjustments for the following: all income resulting from the incident, all income from alternative employment or business undertaken, potential income from alternative employment or business not undertaken but reasonably available, and saved overhead or normal business expenses not incurred as a result of the incident, and state, local, and federal tax savings. 33 CFR 136.235(a-e).

V. CLAIMANT'S ARGUMENT:

At the time of the spill, Baumarine AS (Baumarine) acted as the pool operator for a large number (pool) of Panamax bulk carriers, in which GOGL was a participant. According to the pool agreement, the earnings received from employing the vessels, after deduction of costs, are subsequently redistributed to the vessel owners, including GOGL. The earnings of each vessel depend upon the pool earning points (PEP) assigned to that vessel, as well as individual factors such as downtime or being placed off-hire.

GOGL claims that, as a result of the oil spill, it was required to put the M/V Golden Joy off-hire from 1800 hours GMT (1300 hours CDT, which was the local time for New Orleans, LA in July) on July 25, 2008 until 0348 hours GMT on July 27, 2008 (2248 CDT July 26, 2008), for 1 day, 9 hours and 48 minutes, or approximately 1.40833 days.[3] Because it was placed off-hire, then, the M/V Golden Joy was not able to participate in the pool during that time, thus losing income. Using the January 2009 Pool Hire Statement[4] daily hire rate of $77,978.00, GOGL calculates the off-hire impact to be **$109,818.75** ($77,978.00 x 1.40833 days).

VI. NPFC ANALYSIS:

A. *Findings of Fact:*

1. The incident was the discharge of oil into the Mississippi River on July 23, 2008. 33 U.S.C. § 2701(23), to navigable waters.
2. Real or personal property or natural resources have been injured, destroyed, or lost; specifically oil was released into and injured the Mississippi River, a natural resource of the United States.

[3] See Baumarine Hire Statement for the M/V Golden Joy, submitted with the claim by Nordisk for GOGL on 6/24/2011.
[4] See January 2009 Pool Hire Statement for the M/V Golden Joy, submitted via email by Nordisk for GOGL on 9/20/2011.

3. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.
4. The claim was submitted within three years after the date on which the injury and its connection with the discharge was reasonably discoverable with the exercise of due car. .
5. Presentment of costs to the RP was made by Nordisk, representatives for GOGL, prior to the submission of the claim. The NPFC also made notification of claimed costs to the RP for which the RP responded denying these costs.

B. ***Analysis***:

GOGL's claim that the M/V Golden Joy could not participate in the pool while it was off-hire, thus reducing PEP, is easy to understand. Furthermore, GOGL was able to show how, as a result of the oil spill, it lost earnings from the impacted vessel for those days of delay at Davant and Bootheville. What GOGL has failed to show, however, is how much profit was actually lost by GOGL due to the oil spill and resulting delay.

GOGL has not shown, through the preponderance of the evidence, the actual amount lost due to the DM 932 oil spill. Yes, GOGL explained the M/V Golden Joy's inability to be available to the pool as it was delayed 1.40833 days. It also demonstrated how the pool operator, Baumarine, calculated its monthly hire statements, and how it distributed monies from this pool to its participants, thus showing how GOGL lost earnings due to the vessel being placed off-hire.

In its explanation, GOGL argues that it lost $109,818.75 in earnings that were redistributed to the other vessels in the pool, of which GOGL operated three others (the M/V Arabella, the M/V Golden Lyderhorn and the M/V Torm Anholt). Additionally, as explained, it would appear that the value (or daily average earnings) would be driven by any loss of operational days across the pool, so the M/V Golden Joy's lost days would drive up the daily value for all pool participants. Even though this movement may be slight, there is some gain that must be considered in mitigation. If any other member of the pool was impacted by the spill, then this, too, might increase GOGL's earnings. Furthermore, GOGL has not provided Pool Hire Statements for its other three vessels in the pool to show that any or all did not realize an increase of profits for the month, as there were fewer vessels in the pool doing the same amount of work for the time that the M/V Golden Joy was off-hire.

The NPFC had asked for clarification, explanation and for possible offset of mitigating factors on several occasions. As of this determination, the mitigation and offset has yet to be determined.

C. Determination:

The NPFC hereby determines that the OSLTF will pay $0.00 as full compensation for the claimed lost profits incurred by GOGL and submitted to the NPFC under claim # N08057-0096.

<u>VII. DETERMIN</u>[redacted]

Claim Supervisor: [redacted]

Date of Supervisor's review: 2/3/12

Supervisor Action: Denial Approved

Supervisor Comments: